

020108 Schuessler

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1 IN THE UNITED STATES BANKRUPTCY COURT
2 FOR THE SOUTHERN DISTRICT OF NEW YORK

3 -----X
4 In Re: Case No. 07-35608
5 Chapter 7

6 CHRISTOPHER SCHEUSSLER
7 & BOBBI ANN SCHEUSSLER,

8 Debtor. Poughkeepsie, NY
9 -----X February 1, 2008

10 TRANSCRIPT OF HEARING

11 BEFORE THE HONORABLE CECELIA G. MORRIS
12 UNITED STATES BANKRUPTCY COURT JUDGE

13 APPEARANCES:

14 For Debtors: JOHN J. FALLON, ESQ.

15 For Chase Home LILLIAN WEIGERT, ESQ.
16 Finance: Gellert & Klein PC

17 EDWARD LESNIAK, ESQ.
18 Burke Warren

19 Transcriptionist: KAREN SCHMIEDER, CSR, RDR
20 Schmieder & Meister, Inc.

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24 Proceedings recorded by electronic sound
25 recording; transcript produced by
transcription service.

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1 THE COURT: This is case number

2 020108 Schuessler
07-35608, Christopher and Bobbi Ann
3 Scheussler. State your name and
4 affiliation.

5 MS. WEIGERT: Good morning, Your
6 Honor. Lillian Weigert, Gellert & Klein for
7 Chase Home Finance.

8 It is my pleasure to introduce
9 Edward Lesniak, who has been admitted pro
10 hac vice in this case.

11 MR. LESNIAK: Good morning, Your
12 Honor.

13 MS. WEIGERT: From the law firm of
14 Burke Warren in Chicago. And also with us
15 are the two Chase witnesses Your Honor
16 requested, Miss Deborah Baker and Miss
17 Sophie Salinas.

18 THE COURT: Very good.

19 MR. FALLON: Good morning, Your
20 Honor. John J. Fallon, McDonovan, Fallon
21 for the Scheusslers.

22 THE COURT: Very good.

23 MS. WEIGERT: One preliminary
24 matter.

25 THE COURT: Yes, ma'am.

3

1 MS. WEIGERT: Your Honor, Chase
2 submitted a response in aid of this hearing
3 and requested leave that it be accepted. It
4 was filed online and served on our
5 adversary.

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6 THE COURT: And this was the one
7 that I have?

8 MS. WEIGERT: Correct, Your Honor.

9 THE COURT: Very good.

10 This is the Court's motion, and I
11 want to emphasize today what this hearing is
12 about and what it's not about. It is not
13 about excusing debtors from paying their
14 mortgage payments when they become due. As
15 we all know, bankruptcy is not an
16 opportunity for debtors to shirk their
17 mortgage obligations. Nor is bankruptcy an
18 opportunity for secured creditors to take
19 advantage of the situation by confusing the
20 record, contriving defaults or otherwise
21 attempting to obtain possession of debtor's
22 property solely because the debtor filed for
23 bankruptcy.

24 Moreover, a secured creditor cannot
25 deny certain services or privileges to a

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1 mortgagor solely because the mortgagor filed
2 a bankruptcy petition. The automatic stay
3 is a fundamental right for bankruptcy
4 debtors. An order granting relief from the
5 stay even in a Chapter 7 case is a serious
6 negative consequence for debtors. Thus all
7 filings submitted to a federal court must be
8 taken seriously. Where affidavits are
9 submitted to a Court under penalty of

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10 perjury, this Court has the right to assume
11 the facts sworn to in that affidavit have
12 been carefully researched and to the best of
13 the parties' knowledge are true and correct.

14 It goes without saying that
15 attorneys, as officers of the Court, are
16 held to an even higher standard. The Court
17 must be certain that the party requesting
18 relief is taking the matter as seriously and
19 as carefully as the decision maker. And I
20 will add here, I take my responsibilities
21 seriously and I make my decisions, I hope,
22 carefully.

23 We are not here today to punish a
24 secured creditor out of judicial activism or
25 because it has become fashionable today. It

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1 is my duty, this Court must ensure that if
2 debtors and any debtor that comes before
3 this Court do what is required of them, they
4 will have a shot at a fresh start and/or
5 reorganization, and all of the other rights
6 and benefits contained in the Bankruptcy
7 Code. Where a creditor's policy or
8 practices interfere with those rights, this
9 Court has the authority -- and I might even
10 say I believe this Court has the duty to
11 investigate the conduct.

12 The Court's concern was raised by
13 the debtor's opposition to the lift-stay

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14 motion. Chase's subsequent conduct has only
15 increased this Court's level of concern.

16 The Court has thoroughly reviewed
17 the January 25th, 2008 response from Chase,
18 and momentarily I will comment on Chase's
19 response line by line, and then I will give
20 Chase and debtor's counsel an opportunity to
21 reply. Having said that, this Court will
22 take judicial notice of the spreadsheet and
23 payment history attached to the response and
24 will assume that Chase is absolutely
25 correct; that the debtors chronically made

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1 delinquent mortgage payments; Chase misses
2 the entire point of the order to show cause.

3 Candidly, upon reading Chase's
4 response, the Court had the impression that
5 no one actually read the order to show
6 cause. The order to show cause was
7 carefully worded and drafted, and a thorough
8 response was expected. Chase's response
9 does not address any of the major concerns
10 addressed in the order to show cause.
11 Chase's response makes no effort to address
12 its policy as described in Deborah Baker's
13 affidavit, that mortgagors who are current
14 with their mortgage obligation are permitted
15 to make payments at local branches and by
16 telephone. But on the other hand, Chase
17 informs debtors that their mortgage will be

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18 monitored in the bankruptcy department even
19 if your loan is current. And this
20 apparently means, according to Miss Baker's
21 affidavit, that debtors, even debtors that
22 are current, are not permitted to make
23 payments at Chase branches.

24 The emphasis basically expressed in
25 the affidavit all along has been the word

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1 "current." To emphasize, Chase claims that
2 the privilege of making payments at a local
3 branch is provided to mortgagors who are
4 current with their mortgage obligations, but
5 not on loans under Chapter 7 bankruptcy
6 protection. When the Court expressed
7 concern in the order to show cause that the
8 current debtors would be denied this
9 privilege just because they filed for
10 bankruptcy, Chase's response is that these
11 debtors are delinquent, but does not explain
12 why delinquent mortgagors are granted the
13 privilege of paying at local branch, but the
14 same delinquent mortgagors may not pay at
15 branch if they file for bankruptcy. This
16 would seem to increase the appearance of a
17 bankruptcy bias not alleviated.

18 In the response Chase abandons the
19 grounds it relied upon in the lift stay
20 motion by claiming that the debtor had been
21 paying late for years. Although the debtors

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22 have been paying late for years, they have
23 been paying regularly for years. Every
24 month. And when a month is missed, two
25 payments were made the following month.

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1 Again, I take judicial notice of what's been
2 put in Chase's response in the affidavit.
3 When the debtors pay late, they pay
4 late charges. Paid late, i.e., paid, but
5 late is not the same as not current, which
6 means hasn't paid. And delinquent is not a
7 big deal where the debtor paid the late
8 charges and have substantial equity; two
9 facts completely glossed over or ignored by
10 Chase. It's not just the response that
11 makes the Court think that the order to show
12 cause has been ignored.

13 And by the way, I will take
14 judicial notice of the order to show cause.
15 It's in the record, and the parties are
16 presumed to be familiar with it.

17 Chase's entire course of conduct in
18 this case has been troubling, as noted in
19 the order to show cause. First, after the
20 debtor filed opposition to the lift stay
21 motion; two, after the Court stated that
22 that if Chase has been doing what the debtor
23 says -- and by the way Chase has not
24 disputed one word of the debtor's
25 opposition; in fact, their subsequent

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1 filings have confirmed the debtors'
2 allegation. And three, at that time this
3 Court said I want a hearing on this, and I
4 was clear. We have listened to the
5 records -- that's what I said. Three, after
6 the Court scheduled an evidentiary hearing
7 on the motion, and four, after requesting
8 multiple adjournments, an attempt was made
9 to withdraw the lift stay motion by a one
10 sentence letter filed on the docket from a
11 "legal assistant" acting on behalf of an
12 unknown entity called "Pillar Processing"
13 that had not previously appeared in this
14 case and no explanation of the relationship
15 to the case or on whose behalf Pillar
16 Processing was acting.

17 Just to add to that, on November
18 28, 2007, a letter was filed on the Court's
19 docket in this case, addressed to the Clerk
20 of the Court from a legal assistant acting
21 on behalf of Pillar Processing, LLC, an
22 entity unknown to the Court, and appeared to
23 have no connection with this case or these
24 debtors. The letter stated, and I quote:
25 "Respecting captioned bankruptcy matter,

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1 please be advised that the 362 motion
2 scheduled for December 7, 2007 at 10:30 a.m.

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3 has been withdrawn." Therefore, though no
4 relationship was identified or explained in
5 the body or letterhead, Pillar Processing
6 and Chase's former bankruptcy counsel,
7 Steven Baum, P.C., share the same address
8 and phone number. And the ECF reflects the
9 letter was filed by Dennis Jose, a Steven
10 Baum P.C. attorney on behalf of Chase Home
11 Financing, LLC. Neither Chase nor its prior
12 bankruptcy counsel have made any effort to
13 address this act or the propriety of this
14 action on the record.

15 The Court's order to show cause was
16 met with a barrage of adjournment requests
17 from Chase and its counsel. Some were
18 meritorious and some were not. To give one
19 example, a request for adjournment was made
20 by Chase's former counsel because one of the
21 witnesses ordered to be here had to be at a
22 deposition. But the attorney requesting did
23 not know whether she was taking the
24 deposition, being deposed or defending the
25 deposition or did not indicate whether any

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1 effort had been made to adjourn the
2 deposition.

3 It does not speak well of Chase if
4 even a federal judge cannot get Chase to
5 take orders seriously or get its officers or
6 its counsel to appear without meeting

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7 resistance, evasive action or delay tactics.
8 This is not directed at present counsel, but
9 you must understand that today is the first
10 time Chase has physically appeared in this
11 Court, except by local counsel.

12 This Court is not a consumer debtor
13 that can be shrugged off or ignored. And
14 that brings us to the point of today's
15 hearing. Not only is it unacceptable for
16 Chase to conduct itself this way in a
17 federal court, and that should have been
18 obvious this was an order -- it is equally
19 unacceptable for Chase to treat consumers
20 that way. When this conduct comes to the
21 attention of the Court, the Court has a duty
22 to address it. One of the most difficult
23 things for a Judge is to know whether it is
24 correct to bring matters before the Court on
25 its own motion. It is my understanding, an

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1 understanding I share with most judges that
2 I know, that my job is to ensure the
3 fairness and integrity of the bankruptcy
4 system. It is my responsibility, as I see
5 it, to try to assist the bankruptcy system's
6 dual goal of payment to the creditors and
7 discharge of the debtors are met and fairly
8 balanced. That system is undermined when
9 the debtors are treated unfairly. And it
10 appears that the debtors have been treated

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11 unfairly in this case. They have property
12 with equity. Their payments were refused by
13 the creditors post-petition, putting them in
14 arrears. And the secured creditor then
15 sought relief from this Court so it could
16 commence foreclosure sales based upon those
17 forced arrears. And the payment it refused
18 because the debtor filed for bankruptcy.

19 Those are the big picture concerns
20 as the Court sees them. And they were not
21 addressed in Chase's response. So I am
22 going to be very slow, and I am going to let
23 you write down the objectives of today's
24 hearing.

25 The first one. Whether Chase's

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1 conduct violated Federal Bankruptcy Law
2 Section 9011.

3 Two. Whether sanctions or
4 otherwise warranted against Chase for moving
5 for relief from the stay in this case or for
6 violating the automatic stay.

7 Three. Whether Chase's conduct is
8 an abuse of the Bankruptcy Code. And if so,
9 whether the Court should enjoin that conduct
10 by issuing an order pursuant to 11 U.S.C.
11 105. And I might add here that I think I
12 made it very clear in the order to show
13 cause by referring to the Noseck decision
14 out of Massachusetts.

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15 This Court will be interested in
16 the decision-making and research that went
17 into this lift stay motion, and certain
18 policies that appear to bar all bankruptcy
19 debtors from paying at the branch.

20 I will now give you my analysis of
21 Chase's response. The application to the
22 lift stay motion sought relief from the stay
23 because the note and mortgage provided that
24 the debtor will be in default if they do not
25 make full monthly payments on each date due.

14

1 As of the 29th day of June 2007, the debtors
2 have failed to make two payments in the
3 amount of \$2,079.12, which represents the
4 payments due the 20th day of May 2007,
5 through June 2007 and have not cured said
6 defaults. And I quoted from the lift stay
7 motion, and those were post-petition months.
8 The lift stay application, and I also have
9 that in the Salinas affidavit, and that's at
10 paragraph 5, as the debtor filed their
11 bankruptcy petition on April 30th, 2007, the
12 application appears to allege that they have
13 not made either of the two post-petition
14 payments that have come due as of the date
15 of the lift stay motion. The debtors
16 responded with proof that they have made a
17 post-petition payment in May of 2007 and
18 have attempted to make another payment in

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19 June 2007, which had been refused at the
20 Chase branch. Thus, the debtors claim and
21 Chase does not dispute that the debtors in
22 fact made or attempted to make both
23 post-petition payments. In response to the
24 order to show cause, Chase picks up the word
25 delinquent, which the Court used in the

15

1 order and suggests that its lift stay motion
2 was warranted because the debtors were
3 delinquent prior to and at the time they
4 filed their petition. And that the payment
5 history shows that they were continually one
6 or two months delinquent up to and including
7 the filing date. That's the response at
8 page three.

9 In the response Chase acknowledges
10 that the debtor made a payment on May 25,
11 2007, which, quote, was promptly processed
12 and applied by Chase to the then next
13 payment, which was for April 20th,
14 pre-petition date, not May the 20th. This
15 fact was not advertised, not even mentioned
16 by Chase in the lift stay application, the
17 Salinas affidavit or the memorandum of law.
18 As Chase notes in its response, the facts
19 could only be discovered by reviewing a
20 spreadsheet annexed to the Salinas
21 affidavit.

22 Chase stresses in the response that

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23 the debtors were continually one or two
24 months delinquent and the attempt to justify
25 moving for the relief from stay. The

16

1 problem is that Chase did not move on the
2 grounds that the debtors were delinquent,
3 pre-petition anyway. Chase moved for the
4 relief based upon the claim that the debtors
5 have failed to make two payments. Of
6 course, one of the two payments the debtors
7 allegedly failed to make was the
8 post-petition payment that Chase refused to
9 accept at its local branch. Leaving this
10 aside for a moment, for Chase to focus on
11 the fact that one payment was delinquent,
12 even if technically correct, is misleading
13 for the many facts Chase leaves out.

14 In the lift stay motion Chase
15 alleges, and I'm quoting from the lift stay
16 motion: The debtors failed to make two
17 payments in the amount of \$2,079.12, which
18 represents the payments due the 20th day of
19 May 2007 through June 2007 and have not
20 cured said defaults. Salinas affidavit.
21 The estimated amount owing to Chase under
22 the note and mortgage, including late
23 charges in the amount of \$63.74, was
24 \$165,394.14. Chase claims interest on the
25 unpaid principal balance will continue to

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1 accrue and to protect its security in the
2 mortgage premises secured creditor may be
3 required to make further advances for
4 property taxes, insurance and related
5 matters.

6 Continuing with Chase: Chase is
7 suffering immediate and irreparable harm and
8 loss in that insufficient income is being
9 received by it on the note secured by the
10 mortgage to pay real estate taxes and hazard
11 insurance. And as each installment payment
12 period passes and as advances are made,
13 secured creditor is further exposed in the
14 equity securing its interest in the
15 mortgaged premises is further diminished to
16 the point where it does not now nor will it
17 have adequate protection for that security
18 interest. Again, that's in the lift stay
19 application.

20 In the memo Chase also argues, as
21 aforementioned, the value of the mortgaged
22 premises is \$299,900; as such, no equity
23 exists. Do the math. Therefore, the stay
24 must be lifted pursuant to 362(d)(1) and
25 (2). In its memo in support of the lift

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1 stay motion, Chase cites case law for the
2 proposition that a debtor's failure to make

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3 regular mortgage payments as they become due
4 constitutes sufficient cause to lift the
5 automatic stay, 11 U.S.C. 362(d)(1). The
6 reality is quite different. Debtors made or
7 attempted to make all post-petition payments
8 as of the date Chase filed the lift stay
9 motion.

10 The debtors indicate in Schedule A
11 to their petition that the value of the
12 collateral subject to Chase's mortgage is
13 \$299,900, which means that there was
14 significant equity in the property, and that
15 Chase was over secured by at least \$120,000.
16 Chase agrees with the debtor's valuation.

17 Lift stay motion. The debtors pay
18 late, but they pay regularly. The
19 spreadsheet attached to the Salinas
20 affidavits show that the debtor has made
21 payments every month, and in the few months
22 where this is not so, double payments the
23 following month since originating the loan
24 in April of 2003. When the debtors pay
25 late, Chase assesses late charges. They pay

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1 the penalty to pay late. The debtors paid
2 all but \$63.74 of these late charges, as
3 Miss Salinas acknowledges in her affidavit.

4 In requesting relief from the stay
5 Chase represented that the debtors failed to
6 make two main payments causing immediate and

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7 irreparable harm and loss because no equity
8 exists and Chase might have to make further
9 advances. In reality, the debtors made
10 regular payments and paid late charges, made
11 or at least attempted to make payments in
12 both post-petition months and have
13 substantial equity. The details omitted
14 from or misrepresented in Chase's motion are
15 the difference in a meritorious motion and
16 an unmeritorious motion.

17 The question arises as to why Chase
18 would move for relief from stay when the
19 debtors appear to have done what they have
20 been doing and Chase has been permitting
21 since February 2005, according to Chase's
22 records. Notwithstanding the fact that
23 debtors attempted to make regular
24 post-petition payments, Chase moved for
25 relief from the stay. It is troubling to

20

1 the Court that Chase has apparently seized
2 the opportunity of this bankruptcy filing to
3 take steps to foreclose on debtors'
4 property. There is no indication in Chase's
5 lift stay motion or in the debtors'
6 statement of financial affairs that Chase
7 commenced a foreclosure action pre-petition.

8 Getting back to the response. One
9 other assertion does not ring true. Chase's
10 main defense in the response is that the

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11 debtor's were consistently one or two months
12 behind for more than a year prior to the
13 filing date. That's in response, page four.
14 The debtors made a post-petition payment at
15 a Chase branch in May 2007. In June 2007
16 the payment was refused. It appears, though
17 it is not explicit in the debtors'
18 opposition to the lift stay motion, that the
19 debtors routinely made their pre-petition
20 mortgage payments to Chase at a local
21 branch. If this is true, then Chase
22 accepted these "delinquent payments" at the
23 branch pre-petition for more than a year.
24 Chase accepting one post-petition payment in
25 May 2007 and then refused a payment in June

21

1 2007. What changed between May 2007 and
2 June 2007? Delinquency is not a
3 satisfactory answer.

4 I am ready to question the
5 witnesses. This is my motion. If you'll
6 stand and raise your right hands. Do you
7 solemnly swear the testimony you're about to
8 give is the truth, the whole truth and
9 nothing but the truth so help you God?

10 MS. BAKER: Yes, Your Honor.

11 THE COURT: State your full name.

12 MS. BAKER: Deborah Karen Baker.

13 THE COURT: And your address,
14 please, Miss Baker.

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15 MS. BAKER: My business address or
16 home address?
17 THE COURT: Give me your business
18 address.
19 MS. BAKER: 3450 New Mission Drive,
20 Columbus, Ohio 41511.
21 THE COURT: Very good. Miss
22 Salinas.
23 MS. SALINAS: My name is Sophia C.
24 Salinas, and I live at 1721 (indiscernible)
25 Avenue in (indiscernible) California.

COURT - SALINAS 22

1 THE COURT: Very good. Miss
2 Salinas, if you'll take the witness box.
3
4 (SOPHIA C. SALINAS, sworn by the
5 Court.)
6
7 EXAMINATION
8 BY THE COURT:
9 Q. Miss Salinas, I've had you now sworn in. Can
10 you tell me what your role is at Chase?
11 A. I am the bankruptcy supervisor there.
12 Q. And when you say "there", what do you mean
13 there?
14 A. At Chase Home Finance in San Diego.
15 Q. What is your venue, jurisdiction; do you deal
16 with all bankruptcy for Chase nationwide or just
17 in your area?
18 A. For subprime bankruptcy.

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19 Q. For subprime bankruptcy?
20 A. Correct.
21 Q. How long have you worked at Chase in this
22 capacity?
23 A. Two and a half years.
24 Q. Approximately how many consumer mortgages do you
25 monitor?

23

COURT - SALINAS

1 A. Each person has about 500 loans, 450 to 500.
2 Q. And you are the person monitoring the
3 Scheussler's loan?
4 A. No, I am not.
5 Q. Well, that's another question. We'll get there
6 in a minute. How many affidavits of the type
7 you filed in this case do you execute in the
8 course of a day?
9 A. I would say maybe 15 to 20 a day, on average.
10 Q. And you don't monitor the Scheussler's loan?
11 A. Not me specifically. We have about 17 people in
12 the bankruptcy department, and each person has
13 450 to 500 loans. So there is one specific
14 person who handles the Scheussler account.
15 Q. And that's not you?
16 A. Correct. I supervise that person.
17 Q. Oh, you supervise that person?
18 A. Yes.
19 Q. So in your capacity as a supervisor is why you
20 signed the affidavit?
21 A. Yes, ma'am.
22 Q. So how many approximately a week of these type

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23 of affidavits do you execute?
24 A. well, daily it's about 15, so times five
25 business days.

COURT - SALINAS

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1 Q. And in a year.
2 A. About the same, 15 a day for the whole year.
3 Q. Practically speaking, how are these affidavits
4 executed?
5 A. well, the analyst gets them from our attorney,
6 and what they do is they put the loan number on
7 it, and they put it in a folder and they put the
8 folder on my desk. And then what I do is I go
9 into that loan or the case -- I can search by
10 either the case or the loan number, and I verify
11 whatever is on that affidavit as far as what the
12 debtor is due for and the payment amounts. If
13 there's any late charges on there I verify that
14 amount as well.
15 Q. And you verified the information on this one?
16 A. That's correct.
17 Q. What information did you consult in compiling
18 this affidavit?
19 A. I didn't -- I didn't make the affidavit myself.
20 Is that what you're asking?
21 Q. That's a good -- that's an interesting answer,
22 but that wasn't what I was asking. You're
23 signing an affidavit?
24 A. Correct.
25 Q. It's your word?

COURT - SALINAS

25

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- 1 A. Correct.
- 2 Q. How do you verify that information for your
3 word?
- 4 A. I check our systems.
- 5 Q. And so you just check the system?
- 6 A. Correct, we --
- 7 Q. And you checked the system on this loan?
- 8 A. I did.
- 9 Q. Did you see that there was a payment made in May
10 2007?
- 11 A. Correct, I did.
- 12 Q. And yet you signed it as being in arrears?
- 13 A. Yes, because the affidavit stated that the loan
14 was two months behind, and at the time I checked
15 it, it was two months behind.
- 16 Q. But it wasn't two months behind after filing of
17 bankruptcy, is that correct?
- 18 A. It was due for May and June.
- 19 Q. And you didn't see that the May payment had been
20 made?
- 21 A. There was a payment made in May, however it paid
22 for April.
- 23 Q. What process did you undertake to ascertain
24 whether or not they were really in arrears?
- 25 A. I checked the payment history.

□

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COURT - SALINAS

- 1 Q. Did you check when they filed for bankruptcy?
- 2 A. Not when they filed for bankruptcy. I checked
3 the payment history when I signed the affidavit.

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- 4 Q. The name Sophie Salinas appears to be stamped on
5 the affidavit. Why?
6 A. Because I stamp it under my signature.
7 Q. You don't -- do you sign it first? Or you just
8 stamp it?
9 A. At the same time, I'm stamping it, and then I'll
10 sign it.
11 Q. On ours, on the one that's filed here, it seems
12 to only be stamped. Do you control that stamp?
13 A. I do, it's my stamp.
14 Q. Nobody else stamps it but you?
15 A. I stamped that one. I stamped them all.
16 Q. But you do have a stamp?
17 A. Yes, I do.
18 Q. And you say you actually also sign them?
19 A. I do sign it.
20 Q. So you did not prepare the affidavit?
21 A. The actual wording of it, no. Our attorney does
22 that on our behalf.
23 Q. And you only check the information on the
24 computer system?
25 A. Correct.

□

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COURT - SALINAS

- 1 Q. And you're in the bankruptcy department?
2 A. Yes, I am.
3 Q. So you know this case was in bankruptcy?
4 A. Yes, I did.
5 Q. So you did not check pre and post-petition
6 bankruptcy; you just saw that it was arrears?
7 A. Through the payment history, yes.

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- 8 Q. who makes the decision to move for relief from
9 the stay?
10 A. The analyst does.
11 Q. The person that works under you?
12 A. Yes.
13 Q. And you keep referring to an attorney. who is
14 the attorney you refer to?
15 A. Steven Baum, I believe it was Steven Baum's
16 office.
17 Q. Excuse me, I must have phrased that wrong. You
18 talked about I would assume an in-house attorney
19 that tells you these are in arrears?
20 A. No.
21 Q. Steven Baum tells you that?
22 A. No.
23 Q. who tells you that this is in arrears?
24 A. we monitor the loan. The analyst monitors the
25 loan, and we check monthly payments on it, so

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COURT - SALINAS

- 1 the analyst sees that it's in arrears.
2 Q. But you said the affidavit was prepared by your
3 attorney?
4 A. That's correct.
5 Q. Is that Steven Baum?
6 A. I believe it was Steven Baum.
7 Q. How do they verify the information?
8 A. what happens is the analyst requests for the
9 motion for relief from stay via a code in the
10 system. That code goes to our vendor. Our
11 vendor sets up --

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- 12 Q. You're going to have to explain to me who a
13 vendor is?
- 14 A. A vendor is -- they are called First American.
15 They work in-house, and they handle our
16 referrals to the attorney, and they handle mail.
17 They have different duties that they do on
18 behalf for Chase. So they refer out the motion
19 for relief in a system called VendorScape.
20 VendorScape is the communication system we have
21 with our attorney. In that referral they
22 indicate the arrears. So they'll put, you know,
23 post-petition payments due. The attorney
24 indicates that they received that --
- 25 Q. Who is the attorney?

□

29

COURT - SALINAS

- 1 A. Steven Baum's office, I'm sorry.
- 2 Q. So it is an outsourced -- it is not a Chase
3 attorney; it is an outsourced attorney?
- 4 A. Correct, correct.
- 5 Q. And then the outsourced attorney compiles the
6 affidavit?
- 7 A. Yes, ma'am.
- 8 Q. And then you sign it?
- 9 A. Correct.
- 10 Q. And you say you checked the information?
- 11 A. Yes, I do.
- 12 Q. So again tell me, so your analyst makes the
13 decision to file the lift stay motion?
- 14 A. To refer it out to our attorney, yes, Steven
15 Baum's office.

020108 Schuessler

- 16 Q. And what kind of information do they send to
17 Steven Baum's office?
- 18 A. I know the case report in VendorScape has the
19 unpaid principal balance, the interest, the
20 payments that are due and the amounts.
- 21 Q. The affidavit indicates that it was executed in
22 Ohio, but the notary is qualified in San Diego.
23 What are the circumstances surrounding the
24 notarization?
- 25 A. They are located in San Diego.

□

30

COURT - SALINAS

- 1 Q. Excuse me?
- 2 A. They are in San Diego.
- 3 Q. But the affidavit says it was executed in Ohio?
- 4 A. I'm not sure. We are located in San Diego.
- 5 Q. So what were the circumstances surrounding
6 notarization? Was the notary physically present
7 when you did it?
- 8 A. They are there, yes.
- 9 Q. Standing there when you do it with a stamp?
10 Remember this is a stamp on this one?
- 11 A. Right. No, what happens is I have to sign it,
12 and then I send it to notary in a folder.
- 13 Q. So they don't see you sign it?
- 14 A. Right, they have a way of verifying signatures.
15 I think they have like a form or something they
16 have to follow matching up the signatures.
- 17 Q. So was this one of a batch of affidavits
18 executed at the same time?
- 19 A. It could be. I'm not sure.

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020108 Schuessler

- 20 Q. Do you execute these in batches yourself?
21 A. Sometimes.
22 Q. And how many at a time?
23 A. Ranging from five, six a person. They'll put
24 them all in one folder at a time.
25 Q. The name of the person notarizing the affidavit

31

COURT - SALINAS

- 1 is Patricia Bonning, who is she?
2 A. She works for First American. That's the vendor
3 I was talking about earlier. They also notarize
4 for Chase.
5 Q. Are they physically present in your same office?
6 A. They are.
7 Q. Do you know her?
8 A. I do.
9 Q. And what is her role at First America?
10 A. As far as I know, she only does notary. She
11 only notarizes documents for both bankruptcy and
12 foreclosure documents.
13 Q. I stand corrected, you did sign it. You did not
14 stamp it. Let the record reflect that.
15 In the exhibits to the lift stay
16 motion there is a letter dated June 3rd, 2007
17 from Diane Ford at Chase in San Diego to Steven
18 Baum, indicating that an affidavit of default is
19 enclosed. Who is Diane Ford?
20 A. She is the person who handles the Schuessler's
21 account.
22 Q. And you are her supervisor?
23 A. Yeah.

020108 Schuessler

24 Q. So she reports to you?

25 A. Correct.

32

COURT - SALINAS

1 Q. How many people report to you?

2 A. About eight people. There is two supervisors.

3 About eight people each supervisor.

4 Q. Does First American get paid by the motion or
5 how do they get paid?

6 A. From what I know they get paid every time they
7 send a referral in VendorScape. So they get
8 paid for each referral that goes out in
9 VendorScape. And that includes proof of claim
10 referrals and motion for relief referrals.

11 Q. How long have you worked with -- who is the
12 person that referred this to you, I'm sorry?

13 A. Referred what to me, I'm sorry?

14 Q. The motion to lift stay in this case, who is
15 your employee?

16 A. Oh, Diana Ford.

17 Q. Oh, yes, Diana Ford. How long have you worked
18 with her?

19 A. About a year, because she started about a year
20 after I did. So about a year.

21 Q. So just give me a little employment stepping
22 stone. She's been employed for Chase about a
23 year --

24 A. Correct.

25 Q. -- so she's the lowest rung in your department?

33

COURT - SALINAS

020108 Schuessler

- 1 A. Correct.
- 2 Q. And she monitors a body of these mortgages?
- 3 A. Correct.
- 4 Q. And you're in the subprime mortgage?
- 5 A. Correct.
- 6 Q. And she then sends it out to First American if
- 7 she sees something that she thinks is in
- 8 arrears?
- 9 A. Correct.
- 10 Q. First American then refers to -- in this case it
- 11 was Steven Baum's office?
- 12 A. Yes, ma'am.
- 13 Q. And then Steven Baum sends it back to you for an
- 14 affidavit?
- 15 A. Correct.
- 16 Q. And you look on the computer system --
- 17 A. Yes.
- 18 Q. -- and verify what went on?
- 19 A. Yes, ma'am.
- 20 Q. So do you make the decisions to foreclose on the
- 21 loans you monitor?
- 22 A. I do not, no.
- 23 Q. And are you consulted?
- 24 A. What do you mean --
- 25 Q. Before someone like Diana Ford would refer it

□

34

COURT - SALINAS

- 1 out, would she say anything to you?
- 2 A. No.
- 3 Q. Is she the one that makes the decision?

020108 Schuessler

- 4 A. Yes, she is.
- 5 Q. Have you previously commenced a foreclosure
6 action yourself?
- 7 A. No, I have not.
- 8 Q. I read the same spreadsheet you read. why did
9 you seek relief from the stay of foreclosure in
10 this case at this time?
- 11 A. Because the debtors were two months behind at
12 the time.
- 13 Q. Even though your records reflect that's not
14 true?
- 15 A. Our payment history shows that they were two
16 months behind.
- 17 Q. Ordinarily, would you recommend that Chase
18 commence a foreclosure action where mortgagors
19 are behind, a month behind but have been paying
20 regularly each month for several years,
21 including making the late payments, would you
22 make this recommendation?
- 23 A. If I see that they are two months behind at the
24 time, yes, I would.
- 25 Q. At the time of what?

□

35

COURT - SALINAS

- 1 A. Of signing the affidavit.
- 2 Q. would it matter to you if the mortgagors are in
3 bankruptcy?
- 4 A. Not necessarily. I mean I'm looking at the
5 affidavit, because they are in bankruptcy.
- 6 Q. would it matter to you that there is equity in
7 the home?

020108 Schuessler

8 A. No. What we do is we leave that to our
9 attorney, to Steven Baum.

10 Q. Were you aware at time you executed the
11 affidavit that the debtors asserted in their
12 petition equity of \$120,000?

13 A. I was unaware of that, no.

14 Q. Did you take any steps to ascertain the value of
15 this collateral?

16 A. I did not myself, no.

17 Q. Would it matter to you?

18 A. Umm, not really. Only because the analyst will
19 provide that to the attorney.

20 Q. So it could have easily been ascertained?

21 A. Correct.

22 Q. You said correct?

23 A. I'm sorry, I don't understand what you're
24 saying.

25 Q. You could easily find out how much the equity

36

COURT - SALINAS

1 is?

2 A. Yes, ma'am.

3 Q. But they didn't check?

4 A. I don't know if our attorney checked.

5 Q. In paragraph six of your affidavit you state
6 that Chase may be required to make further
7 advances for property taxes, insurance and
8 related matters. In your affidavit or in your
9 payment history attached the Court couldn't find
10 a list of the advances that Chase had made to
11 that point. Had they?

020108 Schuessler
12 A. We could have provided it.
13 Q. You could have, but you did not?
14 A. I don't believe so.
15 Q. Do you know if Chase had made any recent
16 advances?
17 A. I do not know offhand, no.
18 Q. And do you know what advances might have been
19 anticipated?
20 A. Maybe taxes and insurance.
21 Q. Do you know if Chase ever made any extensive
22 advances on this loan in the past that were not
23 covered by the payments?
24 A. I don't know.
25 Q. At the time you executed the affidavit, you

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COURT - SALINAS

1 apparently were aware that there was a payment
2 of \$2,110.99 that had been made by the debtors
3 post-petition on May 29th by the debtors and
4 accepted by Chase. Why did you omit any
5 specific reference in your affidavit to the fact
6 that the debtors had made a recent post-petition
7 payment?
8 A. I'm not sure. Our attorney drafts that, so I'm
9 not sure why it was omitted.
10 Q. So you didn't check. What you're saying is you
11 didn't check.
12 A. I check. I checked the wording on the
13 affidavit.
14 Q. Well, it's on the record. I've seen your
15 spreadsheet; it was there?

020108 Schuessler

- 16 A. Um-hmm.
- 17 Q. So if you checked, did you just not see it?
- 18 A. See the payment?
- 19 Q. Yes.
- 20 A. I did see it. I see it when I refer to the
- 21 payment history.
- 22 Q. So you saw it, but you chose to ignore it?
- 23 You're making the affidavit. It's your name on
- 24 the line. It's not Steven Baum's name on the
- 25 line.

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COURT - SALINAS

- 1 A. Right. And what I check in the affidavit is
- 2 that the debtor was due for May and June and
- 3 that's why I signed it.
- 4 Q. So without that information it's sort of -- it's
- 5 not potentially misleading. It is misleading
- 6 when you say payments due the 20th day of May
- 7 2007 through June 2007 when you don't go on to
- 8 say oh, and by the way they've made a payment of
- 9 \$2,110.99 on May 29th. But we're not calling
- 10 that May's payment, we are calling that April,
- 11 pre-petition bankruptcy. But you didn't say
- 12 that, nor did you bring it out. Why did you not
- 13 tell the Court? This is an affidavit going to
- 14 Court.
- 15 A. Yeah, what we do is we tell our attorney all of
- 16 that information, and they draft the affidavit
- 17 on our behalf.
- 18 Q. Can you tell by that spreadsheet whether or not
- 19 certain payments were made at a local branch?

020108 Schuessler

- 20 A. I cannot, no.
- 21 Q. So you don't know if that May 29th -- you don't
- 22 know where that May 29th payment came from, do
- 23 you?
- 24 A. That's correct.
- 25 Q. Can you tell from your spreadsheet how many

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COURT - SALINAS

- 1 other payments were made at that branch?
- 2 A. No, I can't.
- 3 Q. When you looked at that spreadsheet, does it
- 4 appear to you that the payments were correctly
- 5 processed?
- 6 A. Yes, ma'am.
- 7 Q. Do you ever know of an entity called Pillar
- 8 Processing?
- 9 A. No, I don't.
- 10 Q. When you looked at that spreadsheet, had Chase
- 11 accepted payments from the debtor up to this
- 12 point, even though as Chase now maintains they
- 13 were delinquent?
- 14 A. Yes, the payments were accepted.
- 15 Q. What correspondence between Chase and the debtor
- 16 are you aware of regarding debtors' delinquent
- 17 payments?
- 18 A. None that I can think of right now off the top
- 19 of my head.
- 20 Q. I need to ask for some clarification.
- 21 THE COURT: Attachment 1 to the
- 22 response, do you have that; do you have a
- 23 copy of your response to give to Miss

020108 Schuessler

24 Salinas?

25 would you please make sure she has

40

COURT - SALINAS

1 it.

2 MR. LESNIAK: Can I come up and

3 hand it to her, Judge?

4 THE COURT: Please, thank you. I

5 want particularly Schedule 1. You can give

6 her everything, but that's what I want.

7 A. Okay, thank you.

8 BY THE COURT:

9 Q. I need you to explain something. This is from
10 your affidavit, so this is what you've sworn to.

11 In attachment 1 to the response you note the
12 following late charges.

13 A. I'm sorry?

14 Q. You note the following late charges.

15 A. Okay.

16 Q. \$124.47 in February 2005. Are you with me?

17 A. It was actually \$31.81 -- and 87 cents, excuse
18 me, applied. Is that the line you're on?

19 Q. I'm looking at the late charges.

20 A. Yeah, it was \$31.87 applied to late charges, and
21 \$124.47 left in suspense.

22 Q. Okay, I need to look at the attachment too,
23 because I'm off. I have Attachment 1 right here
24 as an exhibit. Because I have \$124.47, and you
25 say -- okay, if you look out in the fourth

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COURT - SALINAS

020108 Schuessler

- 1 column, it says notes, late charges?
2 A. Correct.
3 Q. If you see it says \$124.47 late charges?
4 A. That would be the suspense balance.
5 Q. So that's not a late charge, that's a suspense
6 balance?
7 A. The late charge comment and the notes referring
8 to this \$31.87 here, and then this \$124.47 is
9 referring to the suspense column, and that's how
10 much is left in suspense.
11 Q. So the late charges refers to \$31.87?
12 A. Correct.
13 Q. So in February '04, it is \$31.87 --
14 A. '05, right.
15 Q. Excuse me, yes.
16 A. Yes.
17 Q. And April of '05, it is \$32.84?
18 A. Correct.
19 Q. And May -- what's that \$1.97 applied to
20 principal?
21 A. Yeah.
22 Q. Okay. It is \$30.90 in May?
23 A. Correct.
24 Q. In August it is \$31.87?
25 A. Yes, ma'am.

□

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COURT - SALINAS

- 1 Q. In November '05 \$31.47?
2 A. Um-hmm.
3 Q. December \$31.47?
4 A. Correct.

020108 Schuessler

- 5 Q. January '06, \$63.74?
6 A. Yes.
7 Q. February '06, \$31.87?
8 A. Yes.
9 Q. April '06, \$31.87?
10 A. Yes.
11 Q. May '06, \$71.49?
12 A. Correct.
13 Q. July '06, \$31.87?
14 A. Um-hmm.
15 Q. Another one in July, \$31.87?
16 A. That's correct.
17 Q. August \$31.87?
18 A. Yes.
19 Q. September \$31.87?
20 A. Yes.
21 Q. October \$31.87?
22 A. That's correct.
23 Q. November \$31.87?
24 A. Correct.
25 Q. So then January '07, \$31.87?

□

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COURT - SALINAS

- 1 A. Correct.
2 Q. March '07, \$20.88?
3 A. Yes, ma'am.
4 Q. Why did it change?
5 A. It looks like that was what was left in
6 suspense, so they just applied the entire
7 suspense amount of \$20.88 to late charges.
8 Q. So that's not a late charge at that point.

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020108 Schuessler

- 9 That's an application of it?
- 10 A. Correct.
- 11 Q. And then it jumps to \$42.86 as a late charge?
- 12 A. Correct.
- 13 Q. And then \$31.87, \$31.87?
- 14 A. Yes.
- 15 Q. Okay, thank you. You clarified that for me.
- 16 A. Okay.
- 17 Q. Now, you were a supervisor and yet you signed an
- 18 affidavit, and your name is on that, and yet I
- 19 have not heard you say that you're responsible
- 20 for it. You're saying the person under you is
- 21 responsible for it; it goes to a lawyer that you
- 22 say is responsible for it, and you signed it and
- 23 it is filed with the Court, and you not at any
- 24 point are saying that you're responsible.
- 25 That's what I'm hearing. Am I hearing you

□

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COURT - SALINAS

- 1 correctly?
- 2 A. well, I am responsible for verifying the
- 3 information on it and signing it.
- 4 Q. But even though it is wrong, you weren't
- 5 responsible for correcting and saying that there
- 6 was a payment made?
- 7 A. I don't understand how that's wrong. I
- 8 understand that the information was not put on
- 9 there.
- 10 Q. Not only put on there, it's not correct. There
- 11 was a post-petition bankruptcy payment made.
- 12 A. That paid for April, right.

020108 Schuessler

- 13 Q. which is pre-bankruptcy. Is there any penalty,
14 beyond a late charge, when a debtor makes a late
15 payment?
- 16 A. No, the late charge is the only thing assessed
17 to the account.
- 18 Q. What was different about the payment history
19 immediately before and after the bankruptcy
20 filing that was different from the debtors'
21 course of conduct since 2005 that changed your
22 attitude with respect to this loan?
- 23 A. Well, at the time I reviewed it it was
24 delinquent.
- 25 Q. Do you file for foreclosure if it's delinquent

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COURT - SALINAS

- 1 two months?
- 2 A. I don't know the exact foreclosure process.
- 3 Q. So in this one, it was just the fact that they
4 were in bankruptcy, is that correct?
- 5 A. They were in bankruptcy and two months
6 delinquent, that's correct.
- 7 Q. But they hadn't changed their course of conduct?
- 8 A. As far as making payments?
- 9 Q. Yes.
- 10 A. They had made payments up to that point.
- 11 Q. But they had been two months behind before and
12 they made the payments and Chase had taken them,
13 and they paid their late fees, and Chase had
14 taken it, is that correct?
- 15 A. That's correct.
- 16 Q. So the only difference between their course of

020108 Schuessler

17 conduct up until that moment in April of 2007
18 was the fact that they were in bankruptcy, is
19 that correct?

20 A. Yes, that's correct.

21 Q. Are you familiar with Chase's policies for
22 accepting or refusing mortgage payments at
23 branch locations?

24 A. No, I'm not familiar with their procedures.

25 Q. Are you involved in decision-making at any

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COURT - SALINAS

1 level?

2 A. As a supervisor?

3 Q. Yes.

4 A. Yes, I am.

5 Q. Were you at any point involved with or familiar
6 with the decision-making concerning this loan?

7 A. No, other than signing the affidavit, no.

8 Q. So it's a different department evaluating it
9 under different standards when there's a
10 bankruptcy filed?

11 A. What do you mean by different department?

12 Q. Well, you said right now you haven't evaluated
13 it at all. You let other people do it. All you
14 did was sign an affidavit that was put under
15 your nose?

16 A. Correct.

17 Q. And the only difference was they were in
18 bankruptcy, so you're not involved with or
19 familiar with the decision-making on this loan?
20 You didn't decide to file this relief from stay?

020108 Schuessler

- 21 A. That's correct.
- 22 Q. And the only point you're testifying before this
- 23 Court today, even though you're supervisor, is
- 24 that you look on a computer screen and verify
- 25 one thing and sign an affidavit?

□

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COURT - SALINAS

- 1 A. That's correct.
- 2 Q. And you didn't research it in any other way and
- 3 didn't feel it necessary to let anyone know
- 4 about that payment that had been made?
- 5 A. The attorneys were aware. They are aware. They
- 6 are provided a payment history at the time of
- 7 motion for relief referral.
- 8 Q. So you can't answer the question -- or maybe you
- 9 can, whether payments were permitted and later
- 10 not permitted at the local branch?
- 11 A. I'm not sure, no.
- 12 Q. And can you or can you not explain why the
- 13 debtors, who were apparently delinquent, quote,
- 14 using your answer, your firm's answer, were
- 15 permitted to pay at a Chase branch up until the
- 16 time they filed for bankruptcy, but payments
- 17 were rejected thereafter?
- 18 A. I'm not sure of the branch procedures.
- 19 Q. Can you explain why Chase does not permit
- 20 bankruptcy debtors to make payments at the local
- 21 branch, even if they are current?
- 22 A. well, the only thing that I can think of is we
- 23 need to ensure that they get processed
- 24 appropriately.

020108 Schuessler

25 Q. For your benefit, and not for the debtor's

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COURT - SALINAS

1 benefit.

2 A. Not necessarily.

3 Q. Well, that was my comment, and it didn't need an
4 answer.

5 why is it not possible for the
6 payments to be accepted at the branch and
7 forwarded to the appropriate person; is there
8 any reason? You've said it's not, as far as
9 you're concerned, it's not reflected in your
10 looking at the computer screen. So do you see
11 any reason why that couldn't be done?

12 A. Well, my thought is if the debtor were to go
13 into the branch, branch doesn't necessarily know
14 what's going on with the account, and there
15 could be a violation of the stay. Maybe the
16 branch person could ask something about the
17 payments in violation of the stay.

18 Q. So it protects Chase and not the debtor is what
19 you've just said. Was the May 29, 2007 payment
20 that the debtors made at the Chase branch
21 correctly processed?

22 A. Yes, it was.

23 THE COURT: You may question your
24 witness.

25 MR. LESNIAK: I just have a few

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LESNIAK - DIRECT - SALINAS

020108 Schuessler
1 questions, Your Honor.

2 THE COURT: If you'll stay back by
3 the microphone.

4 MR. LESNIAK: Oh, excuse me, Judge,
5 my apologies.

6

7 DIRECT EXAMINATION

8 BY MR. LESNIAK:

9 Q. Now, Miss Salinas, you mentioned that an analyst
10 under your supervision makes the decision to
11 move for relief from stay, is that correct?

12 A. Yes.

13 Q. Okay, does that analyst have any criteria that
14 the analyst is told to follow in terms of making
15 that determination?

16 A. Yes.

17 Q. And what is that criteria?

18 A. Two months delinquent, and it comes off of a
19 report that we instruct them to print on a
20 monthly basis.

21 Q. And that report is sent to your recollection,
22 correct?

23 A. I ask them to print it, and they do turn it back
24 into me.

25 Q. Do they turn it back into you when you get the

□

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LESNIAK - DIRECT - SALINAS

1 affidavit?

2 A. No, it's turned in before, once it's completed.

3 Q. So you see the report before the decision to
4 move for relief is actually sent out to the

020108 Schuessler
5 attorney, is that correct?
6 A. Yes, that's correct.
7 Q. So you as supervisor have looked over that
8 decision and determined that it complied with
9 criteria and policies in place, is that correct?
10 A. Yes, we are responsible for reviewing that
11 report.
12 Q. And then what I would like to ask you to look at
13 is -- well, I'll do it from memory, the detailed
14 transaction history that you have in front of
15 you --
16 A. Yes.
17 Q. -- okay?
18 A. Yes.
19 Q. Now, in the bankruptcy department, in Chapter 7
20 cases does Chase draw a distinction between
21 pre-petition or post-petition payments?
22 A. We don't.
23 Q. So when a payment comes in, you'll just apply it
24 to the next due payment, is that correct?
25 A. Contractually, yes.

□

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LESNIAK - DIRECT - SALINAS

1 Q. So when the payment was made on May 25 -- now,
2 let's clarify that -- it is shown as being made
3 on May 25. Is that when it was received -- May
4 25, 2007; is that when it was received by Chase?
5 A. No, the payment was posted on May 29th.
6 Q. Okay. So why does it say May 25?
7 A. That's the effective date.
8 Q. So that was when the borrowers would have come

020108 Schuessler
9 in and made the payment at the teller window,
10 correct?
11 A. Correct.
12 Q. what happens to that payment? Do you know where
13 it goes, how it gets processed so that it shows
14 up as being posted on May 29th?
15 A. The branch sends it out to a processing center,
16 and then it gets posted approximately three
17 business days later.
18 Q. Okay. Now, the amount of the payment that was
19 sent in on May 25, 2007 was \$2,110.99, correct?
20 A. What was that amount? I'm sorry.
21 Q. It is May 25, 2007, the amount of money was
22 \$2,110.99 that was sent in, is that correct?
23 A. That's correct.
24 Q. And what was the amount of the monthly principal
25 and interest and escrow payment?

□

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LESNIAK - DIRECT - SALINAS

1 A. The principal was \$388.63 --
2 Q. No, I'm sorry, let me rephrase that and ask it
3 correctly. The debtors' -- the borrowers'
4 regular monthly payment that was due for April
5 20, 2007 would be how much?
6 A. \$2,079.12.
7 Q. Okay. So is that the same monthly payment that
8 would have been due for May 20th, 2007?
9 THE COURT: You can lead the
10 witness. I did direct.
11 Q. The May payment was also \$2,079.12, is that
12 correct?

020108 Schuessler

- 13 A. That's correct.
- 14 Q. Okay. So when the borrowers made a payment that
- 15 was \$31.87 more than the regular monthly
- 16 payment, and they made that on May 25, does that
- 17 tell you that they intended to pay the April
- 18 payment, which would have had a late charge or
- 19 the May payment which would not have had a late
- 20 charge at that point?
- 21 A. They paid it with the late charge, so it would
- 22 be the April with the late charge.
- 23 Q. Thank you. So then when you looked at the
- 24 detailed transaction history when making your
- 25 affidavit, it showed at that point, June 29,

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LESNIAK - DIRECT - SALINAS

- 1 2007, that they were how many payments past due?
- 2 A. Two.
- 3 THE COURT: It's been asked and
- 4 answered. I don't mind the belabor, but
- 5 I've heard this. Do you have another point
- 6 to make?
- 7 MR. LESNIAK: Not with this
- 8 witness, Judge. Thank you.
- 9 THE COURT: I have another
- 10 question.
- 11 BY THE COURT:
- 12 Q. So the decision to file for relief from stay is
- 13 basically whether or not arrears show up on a
- 14 report, plain and simple?
- 15 A. Yes, ma'am.
- 16 THE COURT: Mr. Fallon, do you have

020108 Schuessler
17 any questions of this witness?
18 MR. FALLON: Just a few, Your
19 Honor.
20 THE COURT: If you'll come to the
21 microphone, please.
22 CROSS-EXAMINATION
23 BY MR. FALLON:
24 Q. Is it my understanding that the bankruptcy
25 department is in San Diego?

FALLON - CROSS - SALINAS

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1 A. Yes, sir.
2 Q. Is there any particular reason why the affidavit
3 says it's in Ohio?
4 A. I'm not sure, no.
5 Q. Do you check that portion of the affidavit
6 before you sign it?
7 A. Yeah, I usually do.
8 Q. And this affidavit was signed by you but not
9 before the notary?
10 A. Signed by me but not before --
11 THE COURT: She's testified to
12 that.
13 Q. Now --
14 THE COURT: You understand you
15 testified to that.
16 THE WITNESS: Yeah.
17 THE COURT: That you send them over
18 in a batch.
19 THE WITNESS: Yeah, I was trying to
20 understand his question. Sorry.

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21 THE COURT: I just want to clarify,
22 Mr. Fallon, what I heard is she does not
23 sign that in front of a notary. She puts it
24 in a folder and sends it to someone else on
25 the premises.

55

FALLON - CROSS - SALINAS

1 BY MR. FALLON:
2 Q. Now, does the analyst, before making a decision
3 as to whether to try to lift the stay, get an
4 appraisal of the property?
5 A. They do. They provide it to the attorney.
6 Q. And do you know whether that was done in this
7 case?
8 A. I am not sure. I would have to look through the
9 notes.
10 Q. well, would it --
11 THE COURT: Do you have your notes?
12 THE WITNESS: I don't think I have
13 them on me, no.
14 BY MR. FALLON:
15 Q. wouldn't that be an important aspect of your
16 decision-making or somebody's decision-making as
17 to whether or not to try to lift the stay?
18 A. Yes, sir.
19 Q. And as far as you can tell from your records,
20 there is no notation one way or another?
21 A. Of the appraisal?
22 Q. Of the appraisal.
23 A. I don't know.
24 Q. well, I mean have you ever seen anything prior

020108 Schuessler
25 to signing this affidavit that would lead you to

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FALLON - CROSS - SALINAS

1 believe that the value of this property as set
2 forth by my clients in their bankruptcy petition
3 was overstated?

4 A. I can't answer that, only because I don't have
5 the notes to see if the appraisal was sent to
6 the attorney or not.

7 Q. But who -- the attorney is the one that makes
8 the decision and not Chase?

9 A. Decision for what, I'm sorry?

10 Q. Who makes that decision as to whether or not to
11 lift the stay?

12 A. Both. The analyst makes a decision to refer it
13 to the attorney.

14 Q. Now, is that decision made based on what the
15 appraisal is?

16 A. For the analyst?

17 Q. Yes.

18 A. No, they don't look at the appraisal to make
19 that decision.

20 Q. So that has absolutely nothing to do with
21 whether they have a secured interest in it or
22 not?

23 A. As far as the analyst is concerned, right.

24 Q. And so the only one who does is the attorney?

25 A. Correct.

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FALLON - CROSS - SALINAS

1 Q. And the attorney is authorized to order an

020108 Schuessler

2 appraisal of the property?

3 A. They ask the analyst to order it, and the
4 analyst is authorized to get it requested, and
5 they would forward it to the attorney.

6 Q. Okay, when the analyst gets it though, does she
7 make or he make any notations on the file to
8 show whether or not this property is
9 under-valued?

10 A. What they do is they just notate that it was
11 sent to the attorney and they would send it out
12 to the attorney. That's all they notate.

13 Q. But you don't have any particular records of
14 what was in this particular case?

15 A. Correct.

16 Q. Now, with regard to the records that you have,
17 are these records produced by you --

18 A. The payment?

19 Q. Number one?

20 THE COURT: Attachment 1.

21 Q. Attachment 1, yes?

22 A. The spreadsheet, yes. Yes, they are.

23 Q. Now, when you looked at that attachment back in
24 June of 2007, did it say that my clients had
25 filed bankruptcy?

□

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FALLON - CROSS - SALINAS

1 A. The document does not state that they filed
2 bankruptcy.

3 Q. And that they filed April 30th?

4 A. It does not state that.

5 Q. It doesn't state that?

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020108 Schuessler

- 6 A. On the attachment, no.
- 7 Q. So but is there somewhere when you're looking at
- 8 the computer screen when you can see when the
- 9 person filed bankruptcy?
- 10 A. Yes.
- 11 Q. And did you note that the debtor when they filed
- 12 bankruptcy they made a post-petition payment on
- 13 May 1st?
- 14 A. I saw that, yes, I did.
- 15 Q. And that they made another post-petition payment
- 16 on May 25th?
- 17 A. Yes.
- 18 Q. And so now comes June 29th, it comes up on your
- 19 screen, is that correct?
- 20 A. Yes.
- 21 Q. Now, under the terms of the note, do the people
- 22 have a 15-day grace period?
- 23 A. They do.
- 24 Q. So that with regard to the June payment, that
- 25 payment is not actually due until fifteen days

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FALLON - CROSS - SALINAS

- 1 after June 20th, is that correct?
- 2 A. Right.
- 3 Q. So that at the time, at the worst-case
- 4 situation, based on your records, my clients
- 5 would have been one month behind?
- 6 A. Due for May and June.
- 7 Q. But June wasn't past due at that point?
- 8 A. We reviewed it I believe it was the 29th of
- 9 June.

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- 10 Q. But isn't one of the problems that some of your
11 records show that the payments are supposed to
12 be due on the first of the month?
- 13 A. They are due on the 20th.
- 14 Q. Right. But so on June 29th, that's within the
15 15-day grace period?
- 16 A. For the late charge, yes.
- 17 Q. So if they paid it on June 29th, it's the same
18 as paying it on June 20th as far as Chase is
19 concerned?
- 20 A. Right.
- 21 Q. So it is not until basically the 4th of July
22 that the late charge would kick in, is that
23 correct?
- 24 A. Right, if that's the 15-day mark.
- 25 Q. Now, also in this particular case my client paid

□

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FALLON - CROSS - SALINAS

- 1 at a branch of Chase on May 25th, and it took
2 four days for it to be posted on your account?
- 3 A. Right. I believe there was a holiday in there
4 somewhere, wasn't there?
- 5 Q. It's probably near Memorial Day. But it isn't
6 done the same day?
- 7 A. It is effective for the same day, but it takes
8 three business days to post, at least three
9 business days.
- 10 Q. So is the late charge based on when it's posted
11 or when it is paid?
- 12 A. The effective date.
- 13 Q. So that the effective date would be -- how can

020108 Schuessler

14 you tell from these records when the effective
15 date was?

16 A. Through the contractual payment history.

17 Q. Now, is it also true from your records currently
18 that you're holding \$2,079 of my clients' money
19 that you haven't applied to anything?

20 A. I don't have an updated payment history on me,
21 so I don't know the exact amount.

22 Q. Okay, the one that you've submitted to the
23 Court?

24 THE COURT: The one you've sworn
25 to.

61

FALLON - CROSS - SALINAS

1 A. Okay, that's correct.

2 Q. And how long have you been holding onto that
3 \$2,079?

4 A. I don't know if it's been posted since this
5 payment history.

6 Q. Okay, but can you tell from the payment history
7 how long you had it?

8 A. August.

9 Q. So since --

10 A. August 22nd, 2007.

11 Q. So you had \$2,079 of their money since August
12 22nd?

13 THE COURT: Has it accrued
14 interest?

15 THE WITNESS: That's just a credit.

16 Q. Well, actually it was \$2100, wasn't it, that
17 you've been holding and you've been deducting

020108 Schuessler

18 late charges from that, so now it is \$2,079?

19 A. That's correct.

20 THE COURT: Read the spreadsheet.

21 MR. FALLON: Yeah, I know.

22 THE COURT: I'm just making a
23 comment.

24 Q. So basically you've got \$2100 of their money
25 since August 22nd that's just lying around

FALLON - CROSS - SALINAS

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1 there. You haven't given them a penny of
2 interest on that, right?

3 A. On the credit?

4 Q. Yeah.

5 A. No, no.

6 Q. I mean Chase wouldn't want something like that
7 to happen to themselves, right?

8 A. Right, we don't do interest on credit.

9 Q. Let me ask you another thing. Your affidavit
10 says that you're a representative of Citibank?

11 A. Right.

12 Q. And are you representative of Citibank or of
13 Chase?

14 A. I work for Chase, but we represent and we
15 service on behalf of Citibank.

16 Q. So who is your employer?

17 A. Chase Home Finance.

18 Q. And they contract out to Citibank to do this?

19 A. We service for Citibank.

20 THE COURT: Would you answer the
21 question first, and then you can explain.

020108 Schuessler

22 But answer his question. You contract out
23 to Citibank?

24 THE WITNESS: I don't know if it
25 would be referred to as contract. I just

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FALLON - CROSS - SALINAS

1 know it's referred to as we service for
2 them.

3 THE COURT: Okay, that doesn't make
4 sense to our world. You got to make it make
5 sense to our world. What does Chase and
6 Citibank actually do?

7 THE WITNESS: It would be a
8 contract between Chase and Citibank.

9 BY MR. FALLON:

10 Q. So Chase owns the mortgage, is that correct?

11 A. Yes.

12 Q. They contract with Citibank to service it, is
13 that correct?

14 A. Maybe I'm just not understanding how to explain
15 it. Cause the only way I know it is we see
16 Citibank as our investor and we service for
17 them.

18 THE COURT: Who owns this mortgage?
19 who owns the mortgage we're talking about?

20 THE WITNESS: Well, Chase has the
21 mortgage.

22 THE COURT: Chase owns the
23 mortgage?

24 THE WITNESS: Chase Home Finance.

25 THE COURT: Chase Home Finance owns

020108 Schuessler

□

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FALLON - CROSS - SALINAS

1 the mortgage and you work for Chase Home
2 Finance?

3 THE WITNESS: Yes, ma'am.

4 THE COURT: So why do you have
5 Citibank on your affidavit?

6 THE WITNESS: Because we service
7 for them.

8 THE COURT: But what have they to
9 do with this mortgage?

10 THE WITNESS: With this affidavit
11 nothing.

12 BY MR. FALLON:

13 Q. Now, do you know whether or not there was any
14 assignment of the original mortgage by JP Morgan
15 Chase to any other entity on the records of the
16 county clerk's office?

17 A. I don't know if the assignments are there. I
18 wouldn't know.

19 Q. Do you know whether they were actually assigned
20 as opposed to just a servicing?

21 A. I'm not sure.

22 MR. FALLON: Okay, I have no
23 further questions, Your Honor.

24 THE COURT: Very good.

25 Any clarification questions?

□

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1 MR. LESNIAK: Yes, Your Honor, if I

020108 Schuessler
2 may. There was an issue about the status of
3 the account, and Miss Salinas only has a
4 payment history that goes back so far. We
5 have printed out and brought with us a
6 current payment history, and she could
7 testify as to the current status of account,
8 so the Court can be assured that all
9 payments have been applied. I would like to
10 do that, if I can.

11 THE COURT: Mr. Fallon, do you have
12 any objection? Have you given it to Mr.
13 Fallon?

14 MR. LESNIAK: I have not, Your
15 Honor.

16 THE COURT: Give it to Mr. Fallon
17 first.

18 MR. LESNIAK: Yes, Your Honor.

19 THE COURT: We'll take a quick
20 break.

21 THE CLERK: All rise.

22

23 (Recess in the proceeding.)

24

25

□

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1 THE COURT: Miss Salinas, I have
2 another question for you. Can you tell me
3 your educational level, please?

4 THE WITNESS: I currently go to the
5 University of Phoenix, trying to get my

020108 Schuessler
6 bachelor's in human service, which is like
7 psychology.

8 THE COURT: And your employee that
9 is under you, whose name I -- the one that
10 sent the Scheussler file to Steven Baum's
11 office, what is her educational level?

12 THE WITNESS: The employee?

13 THE COURT: Yes, do you know?

14 THE WITNESS: I don't know. No, I
15 don't.

16 THE COURT: Okay.

17 Any further questions of this
18 witness?

19 MR. LESNIAK: Yes, Your Honor, we
20 did want to clarify the status of the
21 account.

22 THE COURT: Okay, and you --

23 MR. LESNIAK: I've shown Mr. Fallon
24 the current payment history.

25 THE COURT: Oh, if you'll hand it

LESNIAK - REDIRECT - SALINAS

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1 up to my law clerk.

2 Mr. Fallon, do you have any
3 opposition?

4 MR. FALLON: No, Your Honor.

5 THE COURT: Very good. Okay.

6 MR. LESNIAK: Your Honor, may I
7 hand this to the witness, please?

8 THE COURT: Certainly.

9 THE WITNESS: Thank you.

020108 Schuessler
10 THE COURT: It's not as clear as
11 the attachment, so you're going to have to
12 lead me through it. So what is the
13 current -- where are we currently?

14 MR. LESNIAK: Your Honor, I believe
15 if we go to the last page, it will show what
16 the current status of the account is. I am
17 going to ask Miss Salinas to look at that
18 last page.

19

20 REDIRECT EXAMINATION

21 BY MR. LESNIAK:

22 Q. Tell the Court what the current status is of the
23 account?

24 A. Okay. The next due date is December 2007 as the
25 next payment due.

□

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LESNIAK - REDIRECT - SALINAS

1 Q. And when is the most recent payment that was
2 made?

3 A. On this payment history last payment made is
4 December 31st, 2007, effective for December
5 28th, 2007.

6 Q. I'm sorry, what was the date on the transaction
7 history I gave you?

8 A. January 16th, 2008.

9 MR. LESNIAK: Your Honor, I
10 apologize, I handed up the wrong one --

11 MR. FALLON: We have one --

12 THE COURT: I was going to say, and
13 her testimony doesn't make sense to me.

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14 MR. LESNIAK: It doesn't make sense
15 to me, Judge, but we have a current one.
16 I'm sorry, I had it marked as an exhibit. I
17 grabbed the wrong one.

18 THE COURT: So do you need this?

19 MS. WEIGERT: Can we withdraw this?

20 MR. LESNIAK: No, Your Honor, we do
21 not need that. That was actually the one
22 that was attached to the report.

23 THE COURT: It's in the garbage.

24 MR. FALLON: This is the one I was
25 looking at. I have no objection to that.

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LESNIAK - REDIRECT - SALINAS

1 THE COURT: Okay, so --

2 MR. LESNIAK: Your Honor, I would
3 just like to take a moment, because I think
4 we did not staple all of these,
5 unfortunately. I want to make sure I give
6 her -- yes, we did. Thank you.

7 THE COURT: And we're looking at
8 Chase Exhibit No. 1.

9 MR. LESNIAK: I guess it would be
10 Exhibit No. 1, Your Honor.

11 THE COURT: Okay, so what are we
12 showing?

13 MR. LESNIAK: Cross-examination.

14 Q. Miss Salinas, would you please take a look at
15 the last page of Chase Exhibit No. 1?

16 A. Okay.

17 Q. When was the most recent payment made?

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- 18 A. Posted on January 29th, 2008, effective for
19 January 26, 2008.
20 Q. And what months payment, contractual payment did
21 that make?
22 A. December 2007 payment.
23 Q. And so the borrowers are due for what payment
24 now?
25 A. January 2008.

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FALLON - RECROSS - SALINAS

- 1 Q. In looking over into the suspense column, does
2 it show any money left in suspense?
3 A. Yeah, \$1.02.
4 Q. Okay, so all of the monies, except for that
5 \$1.02 that the borrowers have sent in have been
6 applied to their account, is that correct?
7 A. Yes, sir.
8 MR. LESNIAK: That's all I have,
9 Judge.
10 THE COURT: Very good, you may step
11 down.
12 MR. FALLON: Well, Judge, can I
13 just ask her a quick question?
14 THE COURT: Yes, sir.
15 RECROSS-EXAMINATION
16 BY MR. FALLON:
17 Q. However, when was the last substantial amount
18 taken out of suspense?
19 A. There was an amount taken out of suspense
20 December 31st, 2007.
21 Q. So from August 22nd through December 31st it was

020108 Schuessler
22 suspended?
23 A. Correct, that's the only time I see something
24 coming out of suspense.
25 Q. And since my clients filed a petition in

FALLON - RECROSS - SALINAS

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1 bankruptcy, have they not sent at least one
2 payment every month post-petition to Chase?
3 THE COURT: Can you prove that, Mr.
4 Fallon, do you have copies of the checks?
5 MR. FALLON: Well, I have the
6 copies of the checks, but just on the
7 records it shows that.
8 THE COURT: I would like to see the
9 record show that too.
10 A. Okay. Okay, I see a payment in May.
11 Q. Aren't there two payments in May?
12 THE COURT: You've already
13 testified to two payments in May.
14 A. That's correct, May 1st and May 29th. I don't
15 see a payment in June or July.
16 Q. You see three payments in August.
17 A. Correct, and I see payments in September,
18 October.
19 THE COURT: Three, correct, for
20 three payments in August? This is the in
21 the middle of the brouhaha, all this,
22 correct?
23 MR. FALLON: Yes.
24 A. October, November, December as well.
25 Q. And January?

020108 Schuessler
LESNIAK - REDIRECT - SALINAS

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- 1 A. Correct.
- 2 Q. So every month there has been payments made?
- 3 A. From what I can see, yes.
- 4 MR. FALLON: No further questions.
- 5 THE COURT: Very good.
- 6 MR. LESNIAK: Your Honor, might I
- 7 just ask her about those payments in August,
- 8 so we can clarify for the Court?
- 9 THE COURT: You can clarify for the
- 10 Court, but I'm aware of how that happened.
- 11 Go ahead.
- 12 MR. LESNIAK: Okay, Judge.
- 13 THE COURT: Remember, you got an
- 14 adjournment of this Court during that period
- 15 of time.
- 16 MR. LESNIAK: Yes, Your Honor, I
- 17 understand.
- 18
- 19 REDIRECT EXAMINATION
- 20 BY MR. LESNIAK:
- 21 Q. Miss Salinas, when a motion for relief is filed,
- 22 does it happen sometimes that borrowers make
- 23 payments sometimes after that motion is filed?
- 24 THE COURT: Yes, it happens.
- 25 Q. And what is the bankruptcy department's

□

LESNIAK - REDIRECT - SALINAS

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- 1 procedure in how it handles those payments once
- 2 the motion for relief that has been filed?

020108 Schuessler

3 A. We send them to our attorney for further
4 instruction.

5 Q. Okay, and why do you do that?

6 A. Because a lot of time if the motion is filed
7 it's our attorney's recommendation to not apply
8 them or to yes, apply them. Everything is a
9 case by case practice, so it's best practice for
10 Chase is to forward everything to our attorney.
11 They could have a hearing coming up and they
12 could take them all to the hearing. It just
13 depends on what's going on.

14 Q. Do you know in this case if the checks were
15 received from the Scheusslers and sent to Mr.
16 Jose?

17 A. They were.

18 Q. And when were they applied?

19 A. Those were the August payments that are posted
20 in the payment history. Those are the payments
21 that our attorney had sent back to us to post.

22 Q. And he gave you direction to post those
23 payments?

24 A. That's correct.

25 MR. LESNIAK: That's all I have,

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1 Judge.

2 THE COURT: So here's the question.
3 what payments did they not make? They've
4 all been made. What's not -- they say
5 there's one payment in arrears, is that just
6 the current payment that's coming up?

020108 Schuessler

7 MR. FALLON: It's our belief here,
8 Your Honor -- I realize, based on their
9 records and it looks like they are saying
10 there is some payment missed in '06 or '07.
11 Based on my the client's best knowledge is
12 that she has made every payment.

13 THE COURT: Late though it be.

14 MR. FALLON: Late though it be,
15 right.

16 MR. LESNIAK: Your Honor, the
17 position of Chase is that at this point in
18 time the borrowers are one month behind.
19 They owe for January 20th.

20 THE COURT: Of this year?

21 MR. LESNIAK: Of this year, at this
22 point, yes, Judge.

23 THE COURT: And today is February
24 1st. So they owe for it. But it is still
25 not in arrears yet. It is not even late

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1 yet, because it is fifteen days after
2 January 20th.

3 MR. LESNIAK: Well, it's due on the
4 20th, Your Honor, but the late charge does
5 not apply, as she testified, if they pay
6 within fifteen days.

7 THE COURT: So let's be clear. The
8 only payment that this debtor is in arrears
9 right now is the current payment due January
10 20th.

020108 Schuessler

11 MR. LESNIAK: At this point yes,
12 that is correct, Judge.

13 THE COURT: Very good. You may
14 step down.

15 Miss Baker, if you'll take the
16 witness stand.

17 (DEBORAH KAREN BAKER, previously
18 sworn.)

19 THE COURT: Let me remind you
20 you're under oath.

21 THE WITNESS: Yes, Your Honor.

22 THE COURT: And if you'll tell
23 again for the record your full name.

24 THE WITNESS: Deborah Karen Baker.

25

□

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COURT - BAKER

1 BY THE COURT:

2 Q. And Miss Baker, what is your role at Chase?

3 A. I'm an assistant vice president of the loan
4 support unit, the litigation support unit.

5 Q. And so your department is the litigation
6 department or the litigation support department?

7 A. Litigation support department.

8 Q. And I know this is probably a loaded question
9 for a banker, so I apologize in advance. How
10 many VPs are there in that department?

11 A. Well, I'm not a VP. I'm an assistant vice
12 president.

13 Q. Oh, okay.

14 A. And there's only two.

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020108 Schuessler

- 15 Q. Okay, how many VPs?
- 16 A. One.
- 17 Q. Congratulations.
- 18 A. Thank you.
- 19 Q. How long have you been in this position?
- 20 A. I've been an assistant vice president with Chase
- 21 since January 1st, 2005.
- 22 Q. And were you in this kind of position before or
- 23 how long have you been with Chase?
- 24 A. I've been with Chase since June 30th, 1997. And
- 25 I have been an assistant vice president prior to

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COURT - BAKER

- 1 that.
- 2 Q. In Chase, but in a different department?
- 3 A. No, ma'am, at another company.
- 4 Q. What is your educational background?
- 5 A. High school.
- 6 Q. Are you generally familiar with bankruptcy?
- 7 A. Yes, ma'am, I am.
- 8 Q. And with bankruptcy process?
- 9 A. Yes, ma'am.
- 10 Q. And with the Bankruptcy Code?
- 11 A. Yes, ma'am.
- 12 Q. What is Chase's role in the mortgage banking
- 13 industry?
- 14 A. Are you asking about Chase Home Finance LLC?
- 15 Q. If that's who owned this mortgage, that's who
- 16 I'm talking about?
- 17 A. Chase Home Finance LLC does not own this
- 18 mortgage.

020108 Schuessler

- 19 Q. Who owns this mortgage?
- 20 A. JP Morgan Chase Bank originated the mortgage,
- 21 and then their mortgage was either assigned or
- 22 sold to Citibank, and then Citibank transferred
- 23 the mortgage to Chase for servicing.
- 24 Q. And the records of the county will reflect that?
- 25 A. They should reflect that, Your Honor.

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COURT - BAKER

- 1 Q. So I want to go back then. Who exactly is your
- 2 boss, I mean who do you work for?
- 3 A. I work for Chase Home Finance LLC.
- 4 Q. So what is Chase Home Finance LLC's role in the
- 5 mortgage banking industry?
- 6 A. To service our own loans and to service loans
- 7 for other investors.
- 8 Q. Can you give me an overview of your department?
- 9 A. My department consists of approximately twelve
- 10 to fifteen people. We all work with loans that
- 11 are only in litigation. Anywhere from
- 12 bankruptcy, adversaries through what we call
- 13 true litigation. It can be from underwriting
- 14 until after REO.
- 15 Q. REO?
- 16 A. Real estate owned, after we've sold the
- 17 property.
- 18 Q. Okay.
- 19 A. And we work with our in-house counsel and
- 20 outside counsel in order to research the loans,
- 21 the allegations that have been made against
- 22 Chase to determine if they are accurate, if they

020108 Schuessler

23 are not accurate. And then we provide that
24 information to our in-house counsel.

25 Q. How many residential mortgages of this type does

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COURT - BAKER

1 Chase service?

2 A. Over three million.

3 Q. Of those, are they mostly originated by another
4 branch of Chase, or does Chase Home Finance
5 its -- or Chase just service them?

6 A. It can be various. There's brokers. We do have
7 many branches; however, the branches are not
8 Chase Home Finance employees. They are
9 separate. It's under a separate entity. So I
10 honestly don't know the answer to that question.

11 Q. Well, is it fair to say that Chase, almost no
12 matter what, is in the business of servicing
13 loans; in other words, actively solicits
14 mortgages to service?

15 A. Chase Home Finance, yes, Your Honor.

16 Q. And do you know how Chase came to service this
17 particular mortgage?

18 A. Well, Chase home -- well, back when Chase began
19 servicing this mortgage, it was Chase
20 Manhattan Mortgage Corporation. Chase Manhattan
21 Mortgage Corporation acquired Advanta, which was
22 the entity in San Diego. And at that time
23 that's how we obtained -- and actually, I
24 believe it was before this loan was even
25 originated. It was -- or right about the same

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020108 Schuessler
COURT - BAKER

1 time, 2003, 2004. And so then Chase Home
2 Finance LLC is the successor to the merger of
3 Chase Home Finance, Chase Manhattan Mortgage
4 Corporation.

5 Q. Okay. Is there any requirement that Chase be
6 actually equipped to perform the necessary
7 servicing?

8 A. I'm not sure I understand the question.

9 Q. Is there any requirement that Chase has to meet
10 before they can be a servicing agent?

11 A. I honestly don't know.

12 Q. But in your estimation is Chase well equipped to
13 perform mortgage servicing functions?

14 A. Very well equipped, yes, ma'am.

15 Q. Including those mortgages that are in
16 bankruptcy?

17 A. Yes, ma'am.

18 Q. Do you happen to know what Chase's share of the
19 servicing industry is?

20 A. No, ma'am, I do not.

21 Q. Are you familiar with Chase's policy for
22 accepting or refusing payment amounts, mortgage
23 payments at branch locations?

24 A. I am.

25 Q. Who is responsible for that policy?

□

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COURT - BAKER

1 A. For the writing of the policy?

2 Q. Yes.

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- 3 A. You have to understand that the personnel at
4 branch does not work for Chase Home Finance LLC.
5 They work for Chase Bank, and it's a totally
6 different entity. The policy is that whenever a
7 loan is in bankruptcy, foreclosure --
8 Q. That wasn't my question.
9 A. I'm sorry.
10 Q. Who is responsible for the policy?
11 A. Of servicing loans in bankruptcy?
12 Q. Of whether or not Chase will accept or refuse a
13 mortgage payment at a branch location?
14 A. Chase Home Finance.
15 Q. Okay, Chase Home Finance. So if a person is
16 current and not in bankruptcy, they can pay at a
17 Chase branch?
18 A. Yes, ma'am.
19 Q. So my question still is: Who is responsible for
20 that policy?
21 A. Chase Home Finance is.
22 Q. And who at Chase Home Finance?
23 A. I do not know the answer.
24 Q. So even though you don't know who is responsible
25 for it, your description of the policy in your

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COURT - BAKER

- 1 affidavit and attachments is accurate, is that
2 correct?
3 A. Yes.
4 Q. Is that still the policy?
5 A. It is, yes, ma'am.
6 Q. Are you involved in the decision-making on any

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- 7 level?
- 8 A. Yes, ma'am.
- 9 Q. Were you at any point involved with the
- 10 decision-making concerning this loan?
- 11 A. No, ma'am.
- 12 Q. At what level are you on the decision-making
- 13 then?
- 14 A. For loans in litigation, as far as settlements,
- 15 and if we go to trial, and I am frequently
- 16 deposed.
- 17 Q. What are you deposed on?
- 18 A. Loans in litigation.
- 19 Q. So at what point did you become involved in this
- 20 loan?
- 21 A. After I signed the affidavit, and I believe
- 22 there was a hearing.
- 23 Q. Not here there wasn't. So where was the
- 24 hearing?
- 25 A. Or there was -- from what I understand you had

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COURT - BAKER

- 1 ordered me to appear here.
- 2 Q. I did, because you signed an affidavit.
- 3 A. Correct.
- 4 Q. You signed an affidavit on a policy that you
- 5 have no control over you say, and that you're
- 6 only reflecting what you've been told. Who made
- 7 the policy that you signed and you swore that
- 8 you did? A human being has got to do it.
- 9 A. I know that.
- 10 Q. Don't tell me a mortgage company does it. A

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11 human being does it. Who is the human being
12 that makes the policy?
13 A. Well, I don't believe it is one particular human
14 being.
15 Q. Okay, then who are the human beings that make
16 the policy?
17 A. That would be our -- the way that I have seen it
18 work at Chase, since I've been there ten and a
19 half years, is that any time that there would be
20 a policy, it would go to a committee --
21 Q. Committee of?
22 A. Committee of senior vice presidents at Chase.
23 Q. Okay.
24 A. Then also our legal department would bless or
25 change the policy. At that time it would become

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COURT - BAKER

1 a policy.
2 Q. At what point did you become aware of the fact
3 that the debtors attempted to make a payment at
4 the Chase branch in June '07 and were refused?
5 A. Prior to the time that I signed the affidavit.
6 Q. And why were the debtors permitted and then
7 later not permitted to make their payments at
8 the local branch?
9 A. We don't know the answer to that question.
10 Q. So you are saying that they shouldn't have been
11 permitted to begin with?
12 A. Correct. After the filing of the bankruptcy.
13 Q. A-ha. That's an a-ha moment. That's called a
14 Perry Mason moment in the court, you all.

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15 So why were the debtors permitted and
16 later not permitted, and it's after the filing
17 of the bankruptcy is your answer?
18 A. We don't know why they were permitted.
19 Q. But you said the policy was on the filing of a
20 bankruptcy?
21 A. Once a bankruptcy is filed, there are codes that
22 are either a bankruptcy foreclosure, it can be a
23 homeowner's assistance, which is our loss
24 mitigation department, it can be a loan that the
25 mortgagors are in the military. There are

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COURT - BAKER

1 various reasons why we put codes in the system
2 to stop payments be accepted in the branch.
3 Q. And you said you knew about this policy. What
4 source did you consult to confirm the policy?
5 A. I consulted with our legal department, with our
6 attorneys. I've been to two branch offices, and
7 I've received the same information from each
8 person.
9 Q. Was it in a book? Was it in a manual?
10 A. I have seen manuals, yes, ma'am.
11 Q. But did you consult it when you did your
12 affidavit?
13 A. No, ma'am. I had seen the manuals previously.
14 Q. And is there a code in all of this for equity in
15 the home?
16 A. Normally what I've seen in Chapter 7 bankruptcy
17 is that the trustee will decide if the, you
18 know, if the mortgagor has reaffirmed or not,

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19 and if they want to keep the house. If they
20 don't want to keep the house, then normally the
21 trustee will decide if the house is to be sold
22 or what. So I don't know what happened exactly
23 on the Scheussler's loan.
24 Q. Well, I don't know either. But that doesn't
25 make sense, given that the new level of

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COURT - BAKER

1 exemptions, and of course in Florida that would
2 be a totally different story. So see, you're
3 not talking to me on what I would consider an
4 honest level. Because that's not correct.
5 Because there's a lot of equity in any home in
6 Florida, or there was at one time, in any home
7 in Texas, in any home anyplace else, and of
8 course New York State is up there in exemption.
9 So that there is a lot of equity in homes
10 nationwide.

11 A. Right, yes, ma'am.

12 Q. So I hear you, and I don't want to argue with
13 the witness. I'll just say that doesn't ring
14 true. Because there is equity.

15 So can you explain to me why debtors
16 are not permitted to make their payments at a
17 local branch after they file bankruptcy?

18 A. Yes, ma'am.

19 Q. Okay.

20 A. The local branch does not know that a mortgagor
21 has filed bankruptcy or not. And we don't want
22 them to know. They are not our employees at

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23 all. They are an affiliate. Chase Home Finance
24 has specific departments, such as the bankruptcy
25 department, the foreclosure department, the

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COURT - BAKER

1 homeowner's assistance department, where any
2 time that something out of the ordinary happens
3 on a loan, we want to handle it with the best
4 care possible. We would not --
5 Q. But that's to protect Chase, not the debtor.
6 A. I believe it's a part of the Bankruptcy Code
7 also.
8 Q. No, it's to protect Chase, not the debtor. And
9 it is not part of the Code. But okay.
10 A. Okay. So when we instruct, when we put a code
11 on our system for the branch not to accept the
12 payment, the only thing that they say is
13 inactive. And we don't want them saying
14 anything inappropriate to someone that may be in
15 bankruptcy or in foreclosure. Because once the
16 loan -- just for instance, if it's in
17 foreclosure, we've accelerated that loan and we
18 don't want a payment coming in without our
19 knowledge. And we want to ensure that the
20 payments are posted correctly.
21 Q. So that's your explanation why these debtors who
22 were apparently quote, using another term
23 "delinquent", end quote, were permitted to pay
24 at a Chase branch up until the time they filed
25 for bankruptcy, but payments were rejected

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- 1 thereafter?
- 2 A. They actually did pay at branch on May the 25th.
- 3 Q. That's right. So I've heard Miss Salinas refer
- 4 to Chapter 7, so Chase does not permit Chapter 7
- 5 bankruptcy debtors to make payments at the local
- 6 branch even if they are current?
- 7 A. That's correct.
- 8 Q. Is that also the policy with a Chapter 13
- 9 debtor?
- 10 A. Yes, ma'am.
- 11 Q. Does it make any difference whether or not the
- 12 Chapter 13 debtors are current?
- 13 A. Most Chapter 13 debtors are not current. But it
- 14 would not make a difference.
- 15 Q. I have a question to ask you that goes back to
- 16 what I asked about the codes on the equity. So
- 17 if there are no codes, if Chase forecloses and
- 18 there are no other bidders, then the debtors
- 19 don't get their equity or their exemption, is
- 20 that right?
- 21 A. Well normally, if there was equity in a property
- 22 and it went to a foreclosure sale, there would
- 23 be a lot of third-party bidders, so they would
- 24 receive anything over the total debt of the bid
- 25 of their loan amount that they owed Chase.

□

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COURT - BAKER

- 1 Q. But it probably would be a depressed bid anyway.
- 2 So it would just be up to and a little over what
- 3 the bank is owed. And the debtor would lose

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- 4 their equity portion of it, is that correct?
- 5 A. From what I've seen, the bidding has not gone
- 6 down so much; they are still bidding, multiple
- 7 bidders at foreclosure sale.
- 8 Q. But they would still -- I'm asking, still, the
- 9 debtors would lose their equity if it didn't
- 10 reach that level of bidding. This case in
- 11 point, Chase was owed a hundred and something
- 12 thousand, the value was close to 300,000, maybe
- 13 120 in equity. Had this gone into foreclosure,
- 14 Chase could have credit bid, if no one else did,
- 15 then someone could bid 167 whatever yours was
- 16 and 50 and get it and all their equity would be
- 17 foreclosed completely, is that correct?
- 18 A. That's correct.
- 19 Q. And potentially Chase could bid its debt and
- 20 take the property?
- 21 A. Well, we rely on our --
- 22 Q. Let's answer the question first.
- 23 A. I'm sorry.
- 24 Q. Potentially, Chase could bid its debt and take
- 25 the property?

□

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COURT - BAKER

- 1 A. Yes, ma'am.
- 2 Q. Okay, now then explain what you wanted to tell
- 3 me.
- 4 A. Thank you. We rely on our attorneys, who we
- 5 instruct to file a motion for relief from stay
- 6 to determine whether it should be appropriate or
- 7 not.

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- 8 Q. How much do you pay these attorneys?
- 9 A. There is a different schedule based on the type
- 10 of loan, and I believe the schedule for this
- 11 loan is \$650 for a motion for relief from stay.
- 12 Q. And they don't get that money unless they file
- 13 the motion. If they review it, do they get
- 14 anything for just reviewing it?
- 15 A. I honestly don't know.
- 16 Q. And what about this Amer-- what was the name of
- 17 the company that was in-house out there in San
- 18 Diego? I'm sorry, I can't recall it off the top
- 19 of my head.
- 20 A. First American.
- 21 Q. First American.
- 22 A. Yes, ma'am.
- 23 Q. How much do they get paid?
- 24 A. I'm not sure. I believe it's between \$75 and
- 25 \$150.

□

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COURT - BAKER

- 1 Q. And let me ask the same question. Do they get
- 2 paid simply to review it, or do they get paid
- 3 only if a motion to lift stay is filed or a
- 4 proof of claim is filed?
- 5 A. No, from what I understand, they are paid on --
- 6 they actually package the loan documents. And
- 7 it's based on each package that's sent for
- 8 whatever, whether it is --
- 9 Q. So if they packaged something, in this case, if
- 10 First American packaged something and they sent
- 11 it to Steven Baum, they got the \$75 or \$150?

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- 12 A. Correct.
- 13 Q. Was that then charged back to the debtor?
- 14 A. No, ma'am.
- 15 Q. In your experience, would the ability to make
- 16 payments at a local branch be regarded as a
- 17 convenience for most mortgagors?
- 18 A. Well, in my experience I believe that the
- 19 mortgagors believe that it is.
- 20 Q. Okay.
- 21 A. But in reality, it's really not.
- 22 Q. Well, okay, why is it not?
- 23 A. Because it is and it's not. It's a benefit if
- 24 they are paying on the last due date before a
- 25 late charge is going to be assessed, because

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- 1 they are assured that they will not incur that
- 2 late charge. However, all the branches make a
- 3 batch every night and they send it to a
- 4 processing center. That processing center then
- 5 determines where each check should go:
- 6 Bankruptcy, foreclosure, homeowner's assistance,
- 7 home equity, wherever. Then they overnight that
- 8 to that appropriate department for decision.
- 9 And it normally takes three business days before
- 10 it will show up on their account. In this case
- 11 it was four, because it was Friday, which was I
- 12 believe the Schuesslers paid at 5:39 on Friday
- 13 afternoon, and Monday was a holiday.
- 14 Q. Right.
- 15 A. And it was posted that very next Tuesday, but

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- 16 effective dated as of the Friday.
- 17 Q. Right. So see, I don't understand why a
- 18 mortgagor would not think it is an asset.
- 19 Because if you put it in the mail, you don't
- 20 know it gets there. You don't know if somebody
- 21 has held it up on the other end, you don't know
- 22 what that holiday would do. But this mortgagor
- 23 can walk in, get a proof of payment and they are
- 24 done.
- 25 A. No, that's incorrect.

□

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COURT - BAKER

- 1 Q. Okay.
- 2 A. They get a receipt. That does not ensure that
- 3 we will accept that payment.
- 4 Q. But at least they have a receipt.
- 5 A. They have a receipt.
- 6 Q. And they know that it is -- at least they don't
- 7 have to wait for the check to be cashed, which
- 8 is what often, again, from my experience happens
- 9 in here, the check is just hanging out there and
- 10 nobody knows what's going on with it. At least
- 11 on this one they've got a receipt.
- 12 A. They've got a receipt. However, again, they
- 13 don't have record that that payment may not be
- 14 denied once it reaches the appropriate
- 15 department.
- 16 Q. In your affidavit you state: It's Chase's
- 17 policy not to accept payments on loans under
- 18 Chapter 7 bankruptcy protection -- and you
- 19 called that a protected loan -- at local banking

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20 branches. Said policy of not accepting payments
21 on protected loans at local banking branches is
22 to ensure that payment received on protected
23 loans are processed accurately within the
24 context of the requirements of the Bankruptcy
25 Code, established procedures and well within the

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COURT - BAKER

1 infrastructure for processing such payments. End
2 quote.

3 For mortgage and bankruptcy, why is it
4 not possible for those payments to be accepted
5 at the branch and forwarded, just like you said,
6 to the appropriate person and location P.O. box
7 for processing?

8 A. Well, there's many different reasons. In this
9 case, the Scheusslers, it was a Chapter 7
10 bankruptcy. In Chapter 7s, there is no pre and
11 post. They are due for whatever they are due
12 for. They were due for the April 20th payment
13 when they made the payment on May 25th. So
14 that's what the payment was applied to was April
15 20th. So when Miss Salinas filed the -- or
16 signed the affidavit, she was signing it
17 correctly. Now, if it had been in Chapter 13,
18 we would have had a totally different situation.

19 Q. Let's go back a bit to giving it to a local
20 branch. You compare with at least going in and
21 getting a receipt and putting it in the mail to
22 a Post Office box --

23 A. No, ma'am, to a processing center.

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24 Q. Yeah, but it's got a Post Office box, doesn't
25 it?

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COURT - BAKER

1 A. For them to mail their payments in?
2 Q. Right.
3 A. Yes, ma'am, that's correct.
4 Q. Right. So you send it off in the mail, you
5 don't have a clue, then the money doesn't get
6 cashed, you don't know why. How many days later
7 will you even find out? Whereas at least you've
8 got your receipt. I don't understand why this
9 couldn't be sorted out?
10 A. We tried to withdraw the motion. I don't know
11 if you're aware of --
12 Q. I'm totally aware of it. Pillar Processing had
13 no connection with Chase at all, but to withdraw
14 the motion after I had said I wanted a hearing
15 on it based on what I had heard.
16 A. Right.
17 Q. So yes. And that's why Chase's behavior in this
18 has been unconscionable to me.
19 what is it about Chase's
20 infrastructure that would prevent them from just
21 going to the local branch, the local branch; why
22 could that not be done?
23 A. Basically because we want to take every
24 precaution that that branch -- the branch
25 doesn't see our system at all. Again, they only

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COURT - BAKER

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1 will receive an inactive status when they try to
2 process that. The branch people do not work for
3 Chase Home Finance. They work for JP Morgan
4 Chase Bank. We do not want any inappropriate
5 actions taken against the mortgagor at all. And
6 that's why it's sent directly to the appropriate
7 department for decisioning.

8 Q. So it's protecting Chase. On your miscellaneous
9 Attachment 1, have you looked at that
10 spreadsheet?

11 A. Yes, ma'am.

12 Q. Can you tell from that spreadsheet whether or
13 not a certain payment has been made at a local
14 branch?

15 A. No, ma'am.

16 Q. Do you know from that spreadsheet if the May
17 29th payment was made at a branch?

18 A. No, ma'am, not from a spreadsheet.

19 Q. Can you tell or do you know if many of the
20 debtors' other payments over the years were made
21 at that branch?

22 A. You cannot tell by looking at the spreadsheet,
23 no, ma'am.

24 Q. Does the May 29th payment that the debtors made
25 at the Chase branch appear to be correctly

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COURT - BAKER

1 processed?

2 A. Yes, ma'am.

3 Q. So if payments at a Chase branch is a privilege

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4 for those mortgagors who are current, and if
5 bankruptcy debtors are automatically not allowed
6 to pay at the branch, whether or not they are
7 current or whether or not they have equity,
8 isn't it fair to say that Chase's policy has the
9 effect of denying privileges to debtors in
10 bankruptcy just because they filed for
11 bankruptcy?
12 A. I look at it differently.
13 Q. Okay.
14 A. I look at it as if we are trying to protect the
15 mortgagors.
16 Q. You're protecting Chase, not the mortgagors.
17 A. And that's where I see it differently. I think
18 that if the mortgagors were allowed to go in and
19 make any payments at any time, no matter what
20 stage it's in, we could be basically violating
21 the Bankruptcy Code. Because one of our tellers
22 could say something inappropriate. There could
23 be payments that should have been accepted if
24 they were on an agreed order. They may be
25 making payments that are less than what they

□

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COURT - BAKER

1 should have been. And quite honestly, I don't
2 see it like we're protecting Chase. I see it
3 like we're trying to protect both of us.
4 Q. You've just testified to what I've said, so.
5 In your affidavit you state as per the
6 records of Chase on the 29th of June 2007 the
7 debtors were due for the monthly mortgage

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8 payments of May 2007 and June 2007 in the amount
9 of \$2,110.99 each. As of the fourth day of
10 December 2007, Chase's internal records indicate
11 that the debtors are delinquent for the monthly
12 mortgage payments of October of '07 and November
13 of '07, each in the amount of \$2,362.38, with
14 the suspense balance of \$2,079.70. And a copy
15 was attached as Exhibit C. Will you explain
16 that statement to me that I just read from your
17 affidavit?

18 A. Yes, ma'am, which part are you --

19 Q. Your affidavit, as per your records --

20 THE COURT: Do you have a copy of
21 her affidavit? Give it to her.

22 Q. At paragraph ten: As per the records of Chase
23 on the 29th day of June, 2007, the debtors were
24 due for the monthly mortgage payments for May
25 2007 and June 2007 in the amount of \$2,110.99.

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COURT - BAKER

1 As of the 4th day of December 2007, Chase's
2 internal records indicate that the debtors are
3 delinquent for the monthly mortgage payments of
4 October 2007 and November 2007, each in the
5 amount of \$2,362.38, with a suspense balance of
6 \$2,079.70. A copy of the payment is attached.

7 I need you to explain, and I'll say
8 why. Exhibit C reflects that since the debtors
9 filed on April 30th, six full post-petition
10 months they've appeared to make seven
11 post-petition payments for all but two of the

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12 payments. Three payments of \$2100 were
13 received -- this has to do with what you then
14 finally put in suspense and then paid account?
15 A. Correct.
16 Q. But why didn't you feel it necessary to include
17 the suspense account in your affidavit?
18 A. Because there were funds in it, the suspense
19 account.
20 Q. But you didn't tell the Court, except on the
21 attachment you just said it. So you give an
22 incomplete picture of the full situation, and
23 for every advantage to Chase.
24 The statement in the affidavit
25 suggests that the debtor failed to make payments

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COURT - BAKER

1 for October and November of '07. The amount in
2 the suspense account would have covered that,
3 short ten dollars?
4 A. One of the payments, yes, ma'am.
5 Q. I just think you would have been more accurate
6 if you had said the debtors made right at 16,800
7 in post-petition and about the same amount has
8 come due post-petition. Simply put, they are
9 current. They are ready for this last payment.
10 It is due. I understand it's due.
11 Did you ever send a statement to them
12 saying X would catch you up?
13 A. Yes, ma'am. We sent monthly statements prior to
14 the filing of the bankruptcy, and then we send
15 for informational purposes only after the filing

16 020108 Schuessler
of the bankruptcy.

17 MR. LESNIAK: We have those
18 available, Your Honor, if you'd like to see
19 them.

20 THE COURT: Your questions.

21 But the affidavit did not include
22 the suspense fund amount. It might have
23 been in an attachment that we had to find,
24 but it wasn't in the affidavit. It simply
25 said they were behind.

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1 All right, your questions.

2 MR. LESNIAK: Your Honor, what I've
3 handed up to the Court is a group exhibit,
4 which is a set of the monthly statements
5 that were sent by Chase to the borrower,
6 both pre and post bankruptcy petition.
7 These go back as far as November 4th of '05.
8 And Miss Baker will testify about that,
9 because that's as far back as they keep the
10 record.

11 THE COURT: Mr. Fallon, is there
12 any contest in this?

13 MR. FALLON: I've just seen this.
14 This is what I've just seen.

15 THE COURT: Oh, just this moment.

16 MR. FALLON: I haven't seen them
17 before.

18 THE COURT: I'll let you ask any
19 kind of questions, you want, Mr. Lesniak,

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20 but I think we've all agreed there is one
21 payment due right now, and that's it.

22 MR. LESNIAK: Your Honor, there is
23 one payment that was just made for December,
24 and there is a payment due in January, yes,
25 that is --

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1 THE COURT: January 20th.

2 MR. LESNIAK: That is correct, that
3 is correct. I don't believe that this
4 hearing is about that particular payment,
5 Judge.

6 THE COURT: It's not. It's not.

7 MR. LESNIAK: It's in terms of what
8 you said it's about.

9 THE COURT: I think I was pretty
10 clear about that.

11 MR. LESNIAK: Yes, you were. But
12 it's not my intention to provide those
13 statements for that purpose. Your Honor
14 asked about the statements, and she
15 mentioned what the statements show, and
16 we're going to be able to tell you exactly
17 what the statements show. You had asked if
18 they show -- did the statements show how
19 much they have to pay to catch up. And the
20 answer is in the statements, and I would
21 like to present that as our evidence,
22 because you've inquired about that.

23 THE COURT: Okay.

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24 MR. LESNIAK: Okay? So may I show
25 it to --

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1 THE COURT: Oh, if Mr. Fallon has
2 no objection. Give him a chance to look at
3 it. I will accept it, but he needs to have
4 an opportunity to look at it.

5 MR. LESNIAK: Fine, Judge.
6 Take as long as you need.

7 THE COURT: Is there a letter in
8 here?

9 MR. LESNIAK: There is a letter
10 that was attached to Miss Baker's affidavit,
11 and we will get to that, Your Honor.

12 THE COURT: I've seen that.

13 Mr. Fallon, do you need a recess?

14 MR. FALLON: Just like two minutes,
15 Judge.

16 THE COURT: Certainly. The Court
17 will take a recess.

18 THE CLERK: All rise.

19
20 (Recess in the proceeding.)
21

22 MR. LESNIAK: Your Honor, we were
23 at the point where Mr. Fallon was looking at
24 copies of the statements that Chase had.

25 THE COURT: Mr. Fallon, do you have

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LESNIAK - DIRECT - BAKER

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1 a comment on them?

2 MR. FALLON: I have no objection,
3 Your Honor.

4 THE COURT: Very good. So you're
5 moving these into evidence?

6 MR. LESNIAK: As Chase Exhibit 2.

7 THE COURT: Okay. And your point
8 on them will be?

9 MR. LESNIAK: There's a number of
10 points on it, Your Honor.

11 THE COURT: Okay. I see you have
12 green tabs.

13 MR. LESNIAK: Yes, I do, Your
14 Honor, to try to facilitate specific
15 references we will make -- however, we are
16 admitting the entire document into evidence.

17 (Chase Exhibit 2, monthly mortgage
18 billing statements.)

19

20 DIRECT EXAMINATION

21 MR. LESNIAK:

22 Q. So I'd ask Miss Baker to please take a look at
23 it for a moment. Miss Baker, with respect to
24 the entire group exhibit we have provided, what
25 are those?

□

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LESNIAK - DIRECT - BAKER

1 A. These are monthly mortgage billing statements
2 sent to Mr. and Mrs. Scheussler from Chase prior
3 to the bankruptcy and then informational
4 statements only after the bankruptcy was filed.

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5 Q. Okay. Now even though they were admitted into
6 evidence, I want to make sure something that's
7 very clear. These are copies of documents that
8 are retained by Chase, is that correct?

9 A. That is correct.

10 Q. And in what form are they retained?

11 A. They are retained on our computer system.

12 Q. Okay, and these are copies. Is sending monthly
13 statements the manner in which Chase solicits
14 payment from borrowers for their next loan?

15 A. Yes, sir.

16 Q. Okay. So these are copies of statements that
17 were actually sent out to the Scheusslers, is
18 that correct?

19 A. That is correct.

20 Q. Okay. Now, I would like to refer you to the
21 statement dated May 1, which is the first green
22 tab. Could you find that, please?

23 A. Yes, sir.

24 THE COURT: May 1 when?

25 MR. LESNIAK: May 1, 2007, Your

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1 Honor.

2 THE COURT: Okay.

3 MR. LESNIAK: It should be the
4 first green tab, unless I made an error.
5 It's up on the right-hand corner, the
6 second -- below the loan number.

7 THE COURT: I see it.

8 MR. LESNIAK: Okay.

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9 BY MR. LESNIAK:

10 Q. And Miss Baker, generally speaking, what
11 information is this statement intended to
12 provide to the borrower?

13 A. It's intended to provide the current status of
14 their loan as of May 1st, 2007, when their next
15 monthly payment is due, and if there are any
16 past due payments that need to be paid.

17 Q. Okay. And does this statement do that?

18 A. It does.

19 Q. And could you point out where, please, in the
20 statement it would inform the borrower of the
21 status of the account, the most recent payment
22 and any past due payments?

23 A. It's in -- there is a box area that says loan
24 status. And to your left it says the current
25 payment is due by May the 20th. Past -- and

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1 that payment is in the amount of \$2,079.12. In
2 the middle it states the past due payment is in
3 the amount of \$2,079.12, and a late charge of
4 \$31.87, for a past due amount of \$2,110.99. And
5 then it shows the total amount that's due as of
6 May 1st, which is \$4,190.11.

7 Q. Okay. Is there someplace in the middle of the
8 letter that informs the borrowers that they are
9 past due?

10 A. Yes, sir.

11 Q. Okay, could you read that language, please?

12 A. Yes, sir. It says: Our records indicate that

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- 13 your loan is past due. Please remit the full
14 amount of the payment and charges due as
15 indicated on the payment coupon below.
- 16 Q. All right. Now, please go to the bottom of the
17 statement. There again there is information
18 informing the borrowers that they are past due
19 and what amounts are currently due, is that
20 correct?
- 21 A. Yes, sir.
- 22 Q. Now, what's the purpose of that section at the
23 bottom?
- 24 A. The section at the bottom again is to basically
25 reflect what's at the top. It shows the amount

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- 1 that's due by May 20th, which is \$4,190.11. And
2 then the current payment due, if it's paid prior
3 to June 5th, '07 of \$2,079.12, and the past due
4 payment of \$2,110.99.
- 5 Q. Now, on the actual statement that the borrower
6 gets, is that section perforated?
- 7 A. It is.
- 8 Q. Okay. And what is the borrower supposed to do,
9 if anything, with that section when making
10 payment?
- 11 A. Tear it off and mail it in.
- 12 Q. Okay.
- 13 A. Or --
- 14 Q. Okay, now let's say the borrower comes to a
15 branch to make a payment. What does the
16 borrower show, in addition to a check?

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- 17 A. This monthly payment coupon.
- 18 Q. So the person at the window who would take the
- 19 check that was brought in by the Scheusslers on
- 20 May 25 would probably have this detached
- 21 statement, correct?
- 22 A. That's correct.
- 23 Q. Is there any risk that that person at that
- 24 window could -- who is not a Chase employee,
- 25 could ask the borrowers about the past due

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- 1 payments?
- 2 A. There is.
- 3 Q. Is that one of the reasons why Chase does not
- 4 want payments made at the teller windows in
- 5 bankruptcy, foreclosure and other circumstances
- 6 that you've described?
- 7 A. It is.
- 8 Q. In this particular case, do you recall what
- 9 amount of payment the Scheusslers made on May
- 10 25, 2007; was it the \$2,079.12 or the 2,110.99?
- 11 A. It was the \$2,110.99.
- 12 Q. Okay. Now, I'd also like you to turn to -- and
- 13 please unclip it if you have to -- the second
- 14 page of the statement. Is there any information
- 15 at the top of that statement that provides
- 16 contact information, so if the borrowers have a
- 17 question about whether or not a payment has been
- 18 received, is there a mechanism for them to find
- 19 that out easily?
- 20 A. Yes, yes, sir.

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- 21 Q. And what is that mechanism?
- 22 A. There is all kinds of information on here.
- 23 Customer care, what the hours are, the telephone
- 24 number, the fax number, where to send your
- 25 payments, if you want payoff.

□

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- 1 Q. So if a customer does make a payment and it is
- 2 by mail, and let me back up one step. The
- 3 payment that the Scheusslers tried to make at
- 4 branch in June, that payment was not accepted at
- 5 the branch, correct?
- 6 A. That's correct.
- 7 Q. But the payment itself was not refused?
- 8 A. That's correct.
- 9 Q. Okay. It was later delivered to Chase and
- 10 ultimately processed and credited, is that
- 11 correct?
- 12 A. That is correct.
- 13 Q. Okay. So a borrower who sends in a payment by
- 14 mail, will that borrower then -- well, how long
- 15 would a mail payment take, let's go through that
- 16 process. If a party puts the payment in the
- 17 mail, generally speaking, do you know about how
- 18 long it is before it would get posted to the
- 19 account?
- 20 A. Anywhere from -- depending on the mail and what
- 21 time of the year it is, anywhere from five to
- 22 seven business days.
- 23 Q. And then would the customer have the ability to
- 24 call the customer service number and find out

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25 whether or not that payment had been posted?

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1 A. Yes, sir, and there's also an automated service
2 where you can either input your loan number or
3 your Social Security number, and it will just
4 give you that information when your payments
5 were last processed, how much.

6 Q. So even though the borrowers may be in a Chapter
7 7 bankruptcy, the customer service department
8 has access to those records to be able to answer
9 any inquiries that may be initiated by the
10 borrower, is that correct?

11 A. Normally once a borrower -- that is correct.
12 That is correct. If they have any further
13 questions, they are normally instructed to the
14 bankruptcy department.

15 Q. Okay. But the employee at the branch is not a
16 Chase employee, does not have access to the
17 account history information, is that correct?

18 A. Not at all.

19 Q. So if a payment had been made prior to May, and
20 the Scheusslers walked in in May and asked the
21 teller to find out if that prior payment had
22 been credited, could that teller find out that
23 information?

24 A. No, the teller would instruct the mortgagor to
25 call the 800 number.

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1 Q. And calling the 800 number, that representative
2 could provide that information?

3 A. That's correct.

4 Q. Okay. Now, after a Chapter 7 bankruptcy is
5 filed, I think it was mentioned that there is a
6 code put on the account?

7 A. That's correct.

8 Q. Does that code result --

9 THE COURT: What is the code?

10 THE WITNESS: The code is 70 --
11 it's a class -- first it's a class code that
12 shows that it is either not in collections
13 or not in foreclosure, but it's now in
14 bankruptcy.

15 THE COURT: So your statement
16 earlier, that it wouldn't tell a teller
17 what's going on is untrue?

18 THE WITNESS: No, ma'am.

19 THE COURT: That code basically
20 tells them.

21 THE WITNESS: No, ma'am, that's
22 only on the Chase Home Finance system. Not
23 on the banking system. They are two totally
24 separate systems.

25 THE COURT: What does it do on the

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1 banking system?

2 THE WITNESS: It shows inactive.

3 THE COURT: So it basically says
4 you got trouble.

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5 THE WITNESS: No, ma'am. It can be
6 for a variety of reasons. It can be because
7 an account has been closed --

8 THE COURT: On a mortgage?

9 THE WITNESS: No, ma'am, not a
10 mortgage, just on any account, a checking
11 account, savings account, anything, it will
12 show inactive.

13 BY MR. LESNIAK:

14 Q. So the teller at the window does not know why
15 the payment cannot be accepted at the window, is
16 that correct?

17 A. They have no idea.

18 Q. Okay. After the bankruptcy proceeding --

19 THE COURT: That's incredulous to
20 me. Of course they know. They know
21 something is the matter with the account.

22 MR. LESNIAK: Your Honor, they know
23 the payment can't be accepted --

24 THE COURT: That's right.

25 MR. LESNIAK: -- but I think she's

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1 already testified that it could be
2 because --

3 THE COURT: I've heard the
4 testimony and it's unbelievable --

5 MR. LESNIAK: -- of foreclosure, a
6 number of other reasons.

7 THE COURT: -- testimony. Go right
8 ahead.

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- 9 BY MR. LESNIAK:
- 10 Q. Does Chase Home Finance train the tellers at
- 11 local banking branches?
- 12 A. No, sir.
- 13 Q. Are those local tellers employees of Chase Home
- 14 Finance?
- 15 A. No, sir.
- 16 Q. And they don't have access to the computer
- 17 system?
- 18 A. No, sir.
- 19 Q. So the payment at the branch is merely a
- 20 courtesy, isn't that correct?
- 21 A. That's correct.
- 22 Q. They get a receipt that says we got your check,
- 23 and then they forward it on the same way as if a
- 24 customer had sent it in by mail; it goes through
- 25 the same processing department before it is

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LESNIAK - DIRECT - BAKER

- 1 separated out. Isn't that what your testimony
- 2 was?
- 3 A. Yes, sir.
- 4 Q. Okay. Now, after the Chapter 7 proceeding is
- 5 filed, do the borrowers, who are now bankruptcy
- 6 debtors, do they receive statements?
- 7 A. No, sir. They receive for informational
- 8 purposes only.
- 9 Q. So they do receive statements, but the
- 10 statements, do they look a lot different?
- 11 A. They do.
- 12 Q. Okay. Could you look at the second tab for a

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13 moment please. Could you read the bold language
14 on the first highlighted box?
15 A. Account statement is for informational purposes
16 only.
17 Q. Does it -- could you also read down into the
18 next box, important messages. Is there anything
19 telling the borrower that this statement is not
20 requesting a payment?
21 A. Yes, sir. It says please note, this statement
22 is not a request for payment. It is for
23 informational purposes only. However, you may
24 use the attached coupon below to remit your next
25 payment to Chase.

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LESNIAK - DIRECT - BAKER

1 Q. Now, the coupon below, in this case it only
2 shows a current payment of \$2,079.12. The prior
3 statement showed a past due amount. Does this
4 mean that the account was not past due?
5 A. No, sir.
6 Q. Okay, so are you saying that the statements that
7 are sent after bankruptcy will not show past due
8 amounts, is that correct?
9 A. That's correct.
10 Q. Okay. And do you believe that if those
11 statements did show past due amounts, that that
12 might constitute a violation of either an
13 automatic stay or a discharge injunction?
14 A. Yes, sir.
15 Q. Now, Miss Baker, when a bankruptcy proceeding is
16 filed on a customer, that gets special

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17 treatment; I think you've testified to that.
18 There is a separate department to handle that,
19 is that correct?
20 A. That's correct.
21 Q. Okay. And do you know, is a separate accounting
22 system set up to deal with let's say in Chapter
23 13 cases?
24 A. There is.
25 Q. So it distinguishes pre-petition and

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LESNIAK - DIRECT - BAKER

1 post-petition payments, correct?
2 A. That's correct.
3 Q. Okay, so Chase has that system in place. Now,
4 could you tell me, does Chase Home Finance
5 communicate with --
6 MR. LESNIAK: Excuse me, Your
7 Honor. I would like to withdraw that one.
8 Q. I would ask Miss Baker to look at her affidavit.
9 And I would like you to please find the
10 promissory note, if you would?
11 A. Yes, sir.
12 Q. Okay. Could you look down about the middle of
13 the page to find out; see paragraph three that
14 says payments?
15 A. Yes, sir.
16 Q. Could you read the language about six or seven
17 lines down that tells the borrowers where they
18 are supposed to make their payments?
19 A. It says: I will make my monthly payments to
20 P.O. Box 78828, Phoenix, Arizona 85062-- I

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21 believe it is a zero 828.
22 Q. And then it goes on; there's a little bit more,
23 isn't there, or at a different place?
24 A. Or at a different place, if required by the
25 (inaudible).

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LESNIAK - DIRECT - BAKER

1 Q. Now, when customers go into bankruptcy, does
2 Chase tell the customers, inform them as to
3 where future payments are to be made in
4 accordance with the note?
5 A. Yes, sir.
6 Q. Could you please look at your affidavit and then
7 look at the Exhibit B; there's a letter dated
8 May 3, 2007?
9 A. Yes, sir.
10 Q. Is this the communication you're referring to?
11 A. Yes, it is.
12 Q. Okay. And could you look through that. And I
13 would like to know --
14 THE COURT: Let me get to Exhibit
15 B, please.
16 MR. LESNIAK: Sorry, Judge. I
17 maybe have gone too far.
18 THE COURT: Did I skip it?
19 MR. LESNIAK: It is pretty much
20 near the end, Judge.
21 THE COURT: Is it past the note?
22 MR. LESNIAK: Yes, ma'am.
23 THE COURT: Okay.
24 BY MR. LESNIAK:

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25 Q. Do you see at the top -- and this is the letter

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1 that was sent to the Scheusslers, is that
2 correct?

3 THE COURT: It was sent to Mr.
4 Christopher Scheussler.

5 Q. Christopher Scheussler, is that correct?

6 A. Yes.

7 THE COURT: Let the record reflect
8 it says Christopher Scheussler. It does not
9 say Mrs. Scheussler. Okay.

10 BY MR. LESNIAK:

11 Q. Okay. This is not -- this is a copy of what was
12 actually sent, is that correct?

13 A. Yes, sir.

14 Q. Okay. Could you please note at the top, it says
15 this is not an attempt to collect a debt, for
16 informational purposes only. Do you know why
17 that language is on there?

18 A. Because whenever a person is in bankruptcy we
19 don't try to collect a debt.

20 Q. Okay. And it also says that down at the end of
21 the first paragraph, is that correct?

22 A. Yes, sir.

23 Q. And doesn't it say in that same paragraph that
24 we're extending this letter to explain
25 procedures, is that correct?

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LESNIAK - DIRECT - BAKER

1 A. Yes, sir.

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2 Q. And do those procedures include where to make
3 payments?

4 A. Yes, sir.

5 Q. Okay. And do those procedures of where to make
6 payments include accepting payments at a
7 counter?

8 A. I'm sorry?

9 Q. Does that procedure set forth in that letter
10 include making payments at a local branch?

11 A. No, sir, it does not.

12 THE COURT: May I ask you, this is
13 Chase Home Finance. When you say procedures
14 and policy, that's who you're referring to?

15 MR. LESNIAK: Yes, Judge.

16 THE COURT: Just let the record
17 reflect that.

18 MR. LESNIAK: Just a moment, if I
19 may, Your Honor, to catch up.

20 Q. One final question. You mentioned earlier that
21 Chase Home Finance services or owns as many as 3
22 million mortgage accounts, is that correct?

23 A. Yes, sir.

24 Q. Where are those mortgage accounts located?

25 A. All over the United States.

□

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COURT - BAKER

1 Q. And is there a local Chase Bank near every one
2 of those borrowers?

3 A. No, sir.

4 MR. LESNIAK: That's all I have to
5 ask.

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6 THE COURT: I have a couple of
7 questions, and then I'll let Mr. Fallon.

8 BY THE COURT:

9 Q. I just was looking through this myself right
10 here, and if I look through it -- and I admit to
11 skimming.

12 A. Sure.

13 Q. -- but the overdue amounts and the past due
14 amount remain almost constant more or less for a
15 significant period of time pre-petition. So my
16 question is, my thought is when I see it then is
17 that Chase reacted not to the fact that it was
18 overdue but to the fact they filed bankruptcy.
19 Because consistently they have been behind?

20 A. They have been.

21 Q. And that was my question on that. Does anywhere
22 in that letter that you sent have a policy that
23 says don't do this anymore; don't file at your
24 branch bank anymore?

25 A. No, ma'am, it does not.

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FALLON - CROSS - BAKER

1 THE COURT: Mr. Fallon, the witness
2 is with you.

3 MR. FALLON: Thank you, Your Honor.

4 CROSS-EXAMINATION

5 BY MR. FALLON:

6 Q. where does it advise the person to send their
7 post-petition payments in your letter?

8 A. where?

9 Q. Yes.

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10 A. If I'll -- I can get back to it. To P.O. Box
11 78828, Phoenix, Arizona, and it is 85062-8828.

12 THE COURT: Tell me how to get to
13 that letter again?

14 MR. LESNIAK: That would be the
15 letter of May 3rd, Your Honor. It is
16 Exhibit B to Miss Baker's affidavit.

17 THE COURT: Thank you. I was
18 looking in the wrong place. Go ahead.

19 BY MR. FALLON:

20 Q. And yet with regard to the exhibits of these
21 notices that you've sent, it has a different
22 address, doesn't it?

23 A. Yes, sir, it does.

24 Q. Well, why is that?

25 A. I don't know.

□

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FALLON - CROSS - BAKER

1 Q. Isn't it the exact same address on these
2 statements called account statement information
3 purposes only, the same address as was listed on
4 every monthly statement since 2003 that Chase
5 sent to these people?

6 A. I think I may -- I'm not sure I understand your
7 question.

8 Q. Well, you've submitted that the first document
9 here is I guess November 4th, 2005?

10 A. That's correct.

11 Q. And it has a coupon to send to a particular
12 address?

13 A. Yes, sir.

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14 Q. And that's the same address post-petition,
15 notwithstanding the letter that you claim you
16 sent?

17 THE COURT: It's right after the
18 green tab, the first.

19 A. Yes, it's the same -- well, actually it's the
20 same address. But I was looking on the top of
21 the second page.

22 Q. Top of the second page. And the top of the
23 second page of?

24 A. The account statement for informational
25 purposes. There's where I -- actually it is the

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FALLON - CROSS - BAKER

1 same address. I'm sorry.

2 Q. Right. So the letter confuses a person, gives
3 them an address that's completely different from
4 the monthly statement?

5 A. It does, it does have a different address.

6 Q. Now, going to the two items that were green
7 tabbed, all of the pre-petition statements, if
8 there is any past due payment it mentions it,
9 mentions a late charge, is that correct?

10 A. Yes, sir.

11 Q. Once the person files in bankruptcy, the form is
12 basically the same, but all of a sudden it never
13 lists late charges and it never lists any past
14 due amounts?

15 A. That's correct.

16 Q. So that come May 29th of 2007, when the first
17 statement that was sent to my clients, it lists

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- 18 the only amount due as \$2,079.12?
- 19 A. Yes, sir.
- 20 Q. They wouldn't know there was any late charges
- 21 due from that?
- 22 A. No, sir.
- 23 Q. There is nothing on this statement, on the front
- 24 page of this statement that in any way says that
- 25 this statement has been changed because they

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FALLON - CROSS - BAKER

- 1 filed a petition in bankruptcy?
- 2 A. No, sir, not on this. We had previously sent
- 3 the letter, the May 3rd letter.
- 4 Q. Right, which had the wrong address?
- 5 A. Well, let's them know that we were aware that
- 6 they are in bankruptcy.
- 7 Q. Okay, well, and I'm assuming they are aware they
- 8 are in bankruptcy too?
- 9 A. Right, but --
- 10 Q. But there is nothing on this form that would
- 11 lead me to believe if I have been receiving
- 12 monthly statements from Chase that this is
- 13 really any different from any prior forms, other
- 14 than the fact that now it says I don't owe any
- 15 money that's past due?
- 16 A. Are you asking me if I believe that the forms
- 17 are the same?
- 18 THE COURT: Why don't you restate
- 19 your question.
- 20 Q. All right, do you think the average consumer is
- 21 going to know there's a difference between the

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22 forms pre-petition versus post-petition?

23 A. I would.

24 Q. You would, because you're in the bankruptcy

25 department.

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FALLON - CROSS - BAKER

1 A. No, sir, I'm not in the bankruptcy department.

2 THE COURT: Litigation department.

3 Q. Litigation department, okay.

4 A. No, but I would, just because I would have known
5 what my bill looked like in the past and would
6 have noticed the change.

7 Q. All right. Well, if you thought on May 25th
8 that you paid the May 20th payment and you got
9 this statement May 29th, would you not assume
10 you're current?

11 A. I would not assume that, and the reason I
12 wouldn't assume it is because of the May 1st
13 statement that tells me that I owe two payments.
14 And I know that I paid the past due payment.

15 Q. All right, and if you believed that this
16 statement has now been corrected, you wouldn't
17 know whether or not what caused the statement to
18 change, is that correct, as a customer?

19 A. You may or may not. I think that it would depend
20 on what your bankruptcy attorney would tell you,
21 whether to expect any changes.

22 Q. Well, I mean it's Chase who is communicating,
23 not the bankruptcy attorney?

24 A. Right, but.

25 Q. But can't you tell your customer what happened?

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FALLON - CROSS - BAKER

1 THE COURT: What do you mean?

2 Q. Well, this is just a form. It doesn't really
3 explain anything to the person?

4 A. Well, it explains that we are not trying to
5 collect the debt, and it's for informational
6 purposes only.

7 Q. Well, the other forms, the pre-petition forms
8 also in the small print on the second page say
9 if you're in bankruptcy we are not trying to
10 collect this either. So there's really nothing
11 much different between the forms. Look on page
12 two of the pre-petition ones, near the bottom of
13 the page, it mentions important bankruptcy
14 information?

15 THE COURT: This is the second
16 page?

17 MR. FALLON: Second page, Your
18 Honor, of the pre-petition ones.

19 THE COURT: Oh, I see.

20 Q. And that's no different, other than its
21 location, to the important bankruptcy
22 information on the post-petition?

23 A. Right, it's no different wording.

24 Q. Now, when my client went to Chase on May 25th,
25 the check was taken and properly posted, is that

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FALLON - CROSS - BAKER

1 correct?

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- 2 A. Yes, sir.
- 3 Q. Why wasn't it taken a month later?
- 4 A. Because at that time the classification of the
- 5 loan had been changed in the Chase Home Finance
- 6 system to reflect that the loan was in
- 7 bankruptcy.
- 8 Q. And could they not make a code just simply to
- 9 allow the teller to take that check?
- 10 A. The only code that would change on the banking
- 11 side is one that would go from an inactive loan
- 12 to an active or active status to inactive.
- 13 Q. Now, when my client went in June then she was
- 14 advised to mail it to Phoenix, is that correct,
- 15 or do you know?
- 16 A. I don't know what she was advised.
- 17 Q. Do you have any idea when the check for June was
- 18 received by Chase?
- 19 A. On or about the day that we posted it.
- 20 Q. Okay, so August 22nd, from your standpoint?
- 21 A. No, actually -- I'm sorry, I take that back. We
- 22 received the check. We sent the check to our
- 23 attorney.
- 24 Q. Okay. And then the check for July, what
- 25 happened to that check?

□

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FALLON - CROSS - BAKER

- 1 A. The same thing.
- 2 Q. And then the check for August?
- 3 A. I believe at that time we were instructed, the
- 4 attorney sent the checks back, and we were
- 5 instructed to post the payments.

020108 Schuessler

6 Q. Now, at any time during this period of June,
7 July and towards the end of August, did anybody
8 on behalf of Chase communicate with my clients
9 as to what was happening to their checks?

10 A. On behalf of Chase? I don't know if our
11 attorney did or not.

12 Q. Okay, so you don't know what -- if the people
13 are sending payments that they are not getting
14 credit for at that point, is that correct?

15 A. If the Scheusslers sent in a payment, we would
16 remit the payment to our attorney. Our
17 attorney --

18 THE COURT: Would you cash it or
19 would you just send the check?

20 THE WITNESS: We would send the
21 check. And we expect our attorney to --
22 because it's been referred for a motion, to
23 look at it, to advise us as to whether or
24 not he believes that we should take it based
25 on all of the information regarding the

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FALLON - CROSS - BAKER

1 loan.

2 Q. Well, even with the motion pending, is there
3 anything that prevents Chase from taking the
4 monthly payments?

5 A. Only the motion pending, and that's why we
6 submit to our attorney for advisement.

7 Q. And the motion pending is to lift the stay?

8 A. Correct.

9 Q. But there's nothing that prevents Chase from

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10 keeping the monthly payment at that point?
11 A. well, it's our policy to send it to the attorney
12 for their advisement.
13 Q. Okay, and in the meantime the customer is not
14 being advised about anything, is that correct?
15 A. I do not know if the attorney advises the
16 customer or not.
17 Q. well, how is this supposed to benefit the
18 customer of Chase by no longer being able to pay
19 at the Chase branch?
20 A. I'm sorry? How --
21 Q. I think you said that part of the reason for not
22 taking post-petition payments at branches is
23 because it's supposed to be a protection to the
24 customer?
25 A. That's correct.

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FALLON - CROSS - BAKER

1 Q. And how does this sort of noncommunication when
2 the customer sends it to the address that Chase
3 has asked them to send it to, how does that help
4 the customer?
5 A. well, I believe from what I understand, after
6 the motion for relief from stay is referred to
7 the attorney, the attorney sends the -- you and
8 Schuesslers a letter stating that we are filing
9 a motion for relief from stay. And from that
10 point it is communication between both
11 attorneys.
12 Q. Okay. Now, you I believe testified that when
13 you mail a payment to the Post Office box, it

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14 takes five to seven business days to be posted?
15 A. Yes, sir.
16 Q. Now, does the person get credit for the payment
17 the date it's received?
18 A. Yes, sir.
19 Q. Was it stamped someplace so that somebody knows
20 when it was actually received?
21 A. If a loan is not in bankruptcy foreclosure, the
22 homeowner's assistance department or any other
23 special department, then it's posted at the lock
24 box, which is the P.O. box, which is all Chase
25 personnel. If it's routed to an individual

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FALLON - CROSS - BAKER

1 department, then it's stamped as of the day that
2 it was received at that lock box, so that we
3 know that we need to effective date the check so
4 that there will be no disadvantage to the
5 customer.
6 Q. So regardless of the day it's actually posted,
7 they will get credit for the date that it was
8 received?
9 A. Correct.
10 Q. Now, the advantage of going to a branch of
11 course is you get a receipt and you know it was
12 received that day. You're not relying upon when
13 someone put a date stamp on it, is that correct?
14 A. That it would be -- if the payment is accepted,
15 that it would be effective dated that day, yes,
16 sir.
17 Q. And you have an immediate receipt from the

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18 teller at the Chase branch?

19 A. That's correct.

20 MR. FALLON: I have no further
21 questions.

22 THE COURT: I have a couple.

23 BY THE COURT:

24 Q. So this is not -- it's Chase Home Finance's
25 policy not to allow a Chase branch to do it, is

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COURT - BAKER

1 that correct?

2 A. To accept the payments?

3 Q. Right.

4 A. Yes, Your Honor.

5 Q. And apparently the branch would take it except
6 for Chase's home finance policy?

7 A. The only reason why the branch would not accept
8 a payment is if the person had a Chase account
9 and the check that they were tendering -- say
10 they had \$500 in their account and they were
11 tendering a check for \$600, they would not
12 accept that check.

13 Q. Is it a fair summary that payments from
14 bankruptcy debtors are not permitted at a branch
15 because the branch is not set up to handle it?

16 A. That's correct.

17 Q. And that's what the debtors are being protected
18 from?

19 A. The debtors are being protected from any
20 improper communication regarding bankruptcy or
21 foreclosure or anything about their loan.

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22 THE COURT: Any further questions?
23 MR. LESNIAK: Just one or two, Your
24 Honor.
25

LESNIAK - REDIRECT - BAKER 134

1
2 REDIRECT EXAMINATION
3 BY MR. LESNIAK:
4 Q. Miss Baker, Mr. Fallon pointed out that the
5 informational statements sent after the filing
6 of a case have a different P.O. box number than
7 what was in the May 3, 2007 letter, okay. Does
8 it make any difference?
9 A. No, sir, it's going to end up at the same place.
10 Q. Is there any delay sending it to one box as
11 opposed to another?
12 A. No, sir.
13 THE COURT: Let's follow up with a
14 question.
15 BY THE COURT:
16 Q. What about if it's given at the branch bank;
17 does it go to that P.O. box too?
18 A. No, it goes to a processing center, and then the
19 processing center directs it specifically to the
20 correct department.
21 Q. But that's an internal process, so it gets to
22 the processing center rather quickly?
23 A. Yes, ma'am, overnight, ma'am.
24 THE COURT: Overnight now.
25 Mr. Fallon, do you have any further

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1 questions?

2 MR. FALLON: No, Your Honor.

3 THE COURT: You may step down.

4 THE WITNESS: Thank you. Should I
5 leave this here or take them?

6 THE COURT: They belong to Mr.
7 Lesniak.

8 Mr. Lesniak, do you have anything
9 you wish to add?

10 MR. LESNIAK: In terms of an oral
11 argument, Your Honor, or in terms of
12 witness?

13 THE COURT: Well, in terms of
14 witness.

15 MR. LESNIAK: In terms of
16 witnesses, no, I do not believe so, Judge.

17 THE COURT: And I have to think
18 about oral argument.

19 Mr. Fallon.

20 MR. FALLON: I don't think I need
21 to present any witnesses.

22 THE COURT: Very good. Before you
23 do oral argument, I want to give you the
24 legal standard, because I'm not trying to
25 blind side you in any way.

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1 Bankruptcy Rule 9011(b) provides by
2 presenting to the Court, whether by signing,

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3 filing, submitting or later advocating a
4 petition, pleading, written motion or other
5 paper an attorney or unrepresented party is
6 certifying that to the best of the person's
7 knowledge, information and belief formed
8 after an inquiry, reasonable under the
9 circumstances, that is not being presented
10 for an improper purpose such as to harass or
11 cause unnecessary delay or needlessly
12 increase the cost of litigation. The
13 claims, defenses and other legal contentions
14 therein are warranted by existing law or by
15 nonfrivolous arguments for the extension,
16 modification, reversal or existing law or
17 the establishment of new law. The allegation
18 and other factual contentions have
19 evidentiary support if specifically so
20 identified are likely to have evidentiary
21 support after a reasonable opportunity for
22 further investigation or discovery, and the
23 denial of factual contentions are warranted
24 on the evidence or if specifically so
25 identified or recently based on a lack of

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1 information or belief. Where a pleading or
2 submission from a party violates one or more
3 of the provisions of Bankruptcy Rule
4 9011(b), Rule 9011(c) permits the court,
5 after notice and a reasonable opportunity to
6 respond, to impose an appropriate sanction

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7 upon the attorneys, law firms or parties
8 that have violated Bankruptcy Rule 9011(b)
9 and are responsible for the violation.
10 Sanctions under Rule 9011(c)(2) may consist
11 of or include directives of a non-monetary
12 nature, an order to pay a penalty to Court
13 or if imposed on motion and warranted for
14 effect, deterrent, an order directing
15 payment to the movant of some or all of
16 reasonable attorneys' fees and other
17 expenses incurred as a direct result of the
18 violation.

19 Let me correct one thing. I had
20 misinterpreted Miss Baker's affidavit. And
21 it was on paragraph 10 of her affidavit,
22 where she does in fact talk about the
23 suspense account. What happened was the
24 math was not done, so that I had to look
25 into the backup documentation to find out

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1 that there was at least one payment lacking
2 about ten dollars and some change to have
3 that current.

4 There are many troubling things
5 about this, and I'll listen to your
6 argument. But now you've heard 9011, and
7 I'm looking at 9011 in the prospect that
8 this was filed for an improper purpose. I
9 am also looking at a stay violation. The
10 analysis of Rule 9011 is limited to the four

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11 corners of the filing that Chase submitted
12 to the Court. This is not the case when
13 considering whether stay violation occurred,
14 whether the Court consider any post-petition
15 conduct by a creditor that would have the
16 effect of violating the automatic stay. And
17 I point you to Bankruptcy Code Section
18 362(k), an individual injured by any willful
19 violation of the stay provided by this
20 section shall recover actual damages,
21 including costs and attorneys' fees, and in
22 appropriate circumstances may recover
23 punitive damages. And I am also looking,
24 just so you know what law I'm looking at
25 11-105. And I pointed in my motion, my

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1 order, order to show cause the Noseck
2 decision. And basically in the Noseck
3 decision, a Massachusetts Bankruptcy Court
4 sanctioned a mortgage company, Ameriquest,
5 for failing to adjust its accounting
6 procedures just because the debtor filed
7 bankruptcy. And those are the three areas
8 of law that I'm looking at.

9 Now, how long -- I'm looking at the
10 clock too. How long do you want to make
11 oral argument?

12 MR. LESNIAK: Maybe ten to fifteen
13 minutes, Judge.

14 THE COURT: Mr. Fallon, I'm sure

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15 you want some time too. I think I'm going
16 to let you have lunch.

17 MR. LESNIAK: Your Honor, if it
18 please the Court, we do have travel
19 arrangements today.

20 THE COURT: I'm sure they are not
21 going to be flying. Neither are you. There
22 is ice out there.

23 MR. LESNIAK: I understand, Judge,
24 I'm going to try to make it home. I know it
25 may be late, but --

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1 THE COURT: Where is your flight
2 out of?

3 MR. LESNIAK: Albany.

4 THE COURT: You probably cannot get
5 to Albany right now. You might be able to
6 get someplace else, but you possibly will
7 not be getting to Albany today. I'm just
8 being realistic here. The storm is going
9 north.

10 MR. LESNIAK: I understand, Your
11 Honor. I was tracking it this morning the
12 whole time. I fully understand. I need to
13 get to Albany tonight and I will attempt to
14 do that. But I'll take as long as you'd
15 like.

16 THE COURT: Where are you two
17 ladies flying out of?

18 MS. BAKER: I'm flying out of white

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19 Plains.

20 MS. SALINAS: Stewart.

21 THE COURT: White Plains may be
22 clear. Stewart is going to be as iffy as
23 Albany. Albany is going to be the most
24 iffy. Stewart may fly; they've got longer
25 runways.

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1 we'll take a quick break. You have
2 three areas you need to address.

3 THE CLERK: All rise.

4

5 (Recess in the proceeding.)

6

7 THE COURT: Mr. Lesniak, just so
8 you know, we tried to check and find out
9 about the Albany airport. As far as we can
10 tell right now, the Albany airport is open.
11 LaGuardia is closed and Chicago is closed.

12 MR. LESNIAK: Yes, I did check with
13 United, Your Honor. My flight is still
14 scheduled on time, although expecting
15 delays. But I'm expecting to go out
16 tonight.

17 THE COURT: And that's what it said,
18 that there will probably be departure
19 delays. And we are going to try to find out
20 from the highway patrol.

21 MR. LESNIAK: I greatly appreciate
22 your checking, Judge. Thank you very much.

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23 THE COURT: And I'm sorry everybody
24 is hungry, but we have got a storm going on,
25 so let's hear. Go ahead, sir.

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1 MR. LESNIAK: Thank you, Judge.
2 Your Honor, I wanted to respond to
3 your opening comments, if I could. The
4 response we filed was intended to address a
5 specific factual point, which we felt was
6 the underpinning of the Court's order. It
7 was not intended to be a comprehensive
8 response. It was not intended to provide in
9 writing all of the information and testimony
10 that Your Honor heard here today. So I
11 apologize if we were not thorough. It was
12 really only for very limited purpose and was
13 not intended to be comprehensive. And we
14 tried to provide that information to you
15 today with the witnesses we've presented.

16 Before I move a little further, I
17 want to point out, Your Honor, that Chase in
18 this case, when payments did come in after
19 the motion for relief was filed did attempt
20 to withdraw this motion. That's the reason
21 why the payments are sent when they are
22 received to the attorney, so the attorney
23 can handle it. And if the attorney has the
24 payments that will cause the basis for the
25 motion to go away, the attorney will be

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1 instructed and would be advised certainly to
2 withdraw that motion. I think there was an
3 attempt here to do that, particularly when
4 it was clear that Mr. Jose had enough
5 payments that at worst the account was only
6 one month in arrears. So the trigger for
7 the motion for relief was no longer present
8 and he attempted to remove that.

9 As far as the motion goes itself,
10 Your Honor, I want to hit one point right up
11 front. We did not prepare that motion. We
12 will deal with the consequences of that
13 motion. I am not going to defend to you the
14 fact that as far as one portion of the
15 motion, the 362(d)(2) there's clearly in the
16 breach, there is an admission that there is
17 equity in the property. And I am not going
18 to stand here and argue with you that there
19 was no equity in the property. 362(d)(2) is
20 something that I can't support and justify
21 as I stand here before you.

22 But, there is another part of that
23 motion, that's 362(d)(1). And 362(d)(1) is
24 based on a fairly broad standard for cause.
25 And typically when a borrower goes into

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1 default and is a couple of months behind so
2 that the interest payments are not being

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3 made and interest is accruing on the
4 account, that is a justifiable basis to move
5 forward.

6 I just want to say that opening
7 about the motion, so you kind of have a
8 general feel of where we were.

9 Rule 9011. What we are focusing on
10 there, Judge, is: Is there evidentiary
11 support. Did Miss Salinas lie when she made
12 her affidavit? The answer is no. She
13 looked at the account information. And the
14 account information at Chase showed that
15 they were two months behind.

16 Now, I know there's been some issue
17 that I don't really understand between pre
18 and post-petition payments. This is a
19 Chapter 7 case. It's a Chapter 7 case that
20 the debtors filed a 521 statement of to
21 reaffirm. And no reaffirmation has
22 occurred. I think we need to understand
23 that background, because that really limits
24 what we can say to this borrower. But for
25 the 9011 portion, Miss Salinas looked at it.

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1 Chase got the payment for May, the May 25
2 payment. Chase processed that payment.
3 That payment was made by the Scheusslers in
4 the amount of the past due amount. It was
5 for the prior month's payment, April. So
6 whether you like the policy or not, the

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7 policy is that when they are two months in
8 arrears, they will move for relief from the
9 automatic stay. That was triggered by the
10 analyst. Miss Salinas looked at it. At the
11 time she signed her affidavit they were in
12 fact two months behind according to Chase's
13 records. So in my view there is substantial
14 evidentiary support for that affidavit, and
15 as a result there is no basis to award
16 sanctions under 9011. We were in arrears;
17 the motion was in part based on 362(d)(1)
18 for cause, and so there is a basis to move
19 forward on that motion. I would reiterate
20 that Chase backed off once additional
21 payments came in and got into Mr. Jose'
22 hands.

23 Someone can argue that, you know,
24 they should have been credited a little
25 sooner. Perhaps, but he was trying to

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1 apparently work it out with the borrower's
2 counsel and had those checks, and then
3 reached a point where he said okay, we need
4 to process these checks and then withdraw
5 the motion, and he did do so.

6 THE COURT: Can you explain Pillar
7 Processing?

8 MR. LESNIAK: No, Judge, I do not
9 know who that is. Perhaps I should have had
10 Mr. Jose here. I don't really know. I just

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11 know that the motion was withdrawn. I don't
12 have any idea. I've never met him before.
13 we have only talked on the phone.

14 THE COURT: By an unknown entity.

15 MR. LESNIAK: I don't know his
16 situation there.

17 Your Honor, you cite a couple of
18 cases that I want to refer to, and I think
19 you did those in the context of the Rule
20 9011 situation. The first is Noseck --
21 excuse me, not Noseck, let me go to Fagen.
22 Fagen was a situation in which the lender's
23 own records showed that the borrowers were
24 not in default. That is very different from
25 the current situation. Miss Salinas

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1 described the procedures she went through.
2 She described the information she looked at.
3 we've showed the Court the detailed
4 information she looked at. And when she
5 looked at it on June 29, 2007, the account
6 was two months in arrears according to those
7 records. So this is not a Fagen situation
8 where you can look at it and say according
9 to your records you're not in default. They
10 were in default for two months at that point
11 in time. So this distinguishes Fagen.

12 The other case was the Gwynn case
13 that Your Honor cited. In that case a
14 credit union essentially withdrew an

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15 individual's membership. And the individual
16 had just taken out a mortgage loan, and the
17 credit union refused to accept any payment.
18 That is not the case here. Chase did not
19 refuse. Chase Home Finance did not refuse
20 to accept payment. Chase Home Finance
21 refused to take a payment at one place, at
22 the local branch. Not all borrowers have
23 local branches. These borrowers had that
24 convenience, but at that particular branch
25 the payment was refused. But when the

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1 payments came in by mail, in accordance with
2 the manner in which Chase had directed the
3 borrowers to make payments, those payments
4 were ultimately received, sent to Mr. Jose,
5 worked out in the motion for relief and then
6 ultimately credited to their account. So
7 this is not the Gwynn case where the lender
8 said I'm not taking any payments. We refuse
9 to take payments in a certain way. And
10 there's a reason for that way, Your Honor.

11 We've identified that what Chase
12 has done has set up a separate department.
13 Miss Baker said there's a separate
14 accounting system in Chapter 13s. We have
15 done what the Noseck Court -- we have
16 already done what the Noseck Court said
17 needs to be done. We recognize the
18 distinction that in bankruptcy there are

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19 certain considerations that have to be made.
20 And frankly, I find it somewhat disingenuous
21 that Chase would be expected to create the
22 separate system but then not be allowed to
23 administer it in a special way. Chase does
24 not want those tellers talking to that
25 borrower. I guaranty you, Judge, if that

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1 teller said to the Scheusslers, oh, I see
2 you're behind a month in your payment, are
3 you going to make a payment? We'd have a
4 stay violation or a discharge injunction
5 violation hearing on our hands. Those are
6 not Chase employees. They do not have
7 access to the Chase Home Finance records.
8 They are not trained by Chase Home Finance.
9 And Chase recognizes that the Noseck Court
10 requires that you have to view bankruptcies
11 as special circumstances; they are
12 different.

13 We are not discriminating against
14 bankrupt borrowers. Miss Baker testified
15 that there are foreclosure cases get special
16 treatment; military get special treatment,
17 because you may not be able to move against
18 military personnel. People in the home
19 assistance program get special treatment.
20 People who have a loan modification pending
21 get special treatment. People who have a
22 short sale pending, they have special

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23 treatment, because those tellers are not
24 equipped to deal with those payments. They
25 have to get handled by a special department,
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1 so we're doing it in accordance with our
2 obligations. That's why it's like that.
3 And I think that's appropriate to have it
4 that way.
5 Now, I would like to move into the
6 105 situation, if I can. And what I would
7 like to point out here, Your Honor, is that
8 lenders have rights too. The Bankruptcy
9 Code does very little to take away the
10 rights of home mortgage lenders, and I'll
11 get into that a little bit more in a second.
12 Specifically, the contract between the
13 borrowers and the lender was that the
14 borrowers will make their payment at P.O.
15 box or where Chase Home Finance directs.
16 Chase Home Finance exercised that right.
17 When the borrowers went into bankruptcy,
18 they told them where to make the payment,
19 okay. They then changed the statements.
20 And again, I find it disingenuous
21 that Mr. Fallon was questioning Miss Baker
22 about the fact that the informational
23 statements don't have the past due amount.
24 As soon as that past due amount goes on
25 there, with a borrower who has been

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1 discharged and has not reaffirmed, we are
2 going to have a discharge injunction
3 violation on our hands. That's what
4 happens. That's why it is done. Your Honor
5 has said repeatedly, this is to protect
6 Chase. And I don't think that motivation is
7 appropriate. It is conduct we are talking
8 about. It is conduct we are talking about,
9 Your Honor.

10 If I have too much to drink and I
11 decide not to get into my car but to call a
12 cab after a dinner out, does it really
13 matter if I'm concerned about hurting myself
14 or if I'm concerned about hurting my car or
15 if I'm concerned about hurting a pedestrian
16 or if I just don't want to get arrested and
17 get a ticket. What's important is that I
18 made the right decision. My conduct was I
19 didn't get in that car. And Chase's conduct
20 here, as evidenced by those statements, is
21 to comply with the Bankruptcy Code. Does it
22 protect Chase? It protects Chase from
23 motions arguing that Chase has violated the
24 statute or violated the discharge
25 injunction, certainly. But the Bankruptcy

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1 Code provides that protection to the
2 borrowers. The Bankruptcy Code says thou
3 shalt not contact the borrowers about

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4 amounts for which they have been discharged.
5 These debtors have been discharged; they
6 have no personal obligation to pay this
7 loan. They have not reaffirmed and at this
8 point it is purely voluntary. So those
9 procedures are set up to comply with the
10 Code. If the Code said we could contact the
11 borrowers, I probably would. But the Code
12 says thou shalt not. That's why those
13 statements say we are not trying to collect
14 a debt. We are not going to show you the
15 past due amount. This is for informational
16 purposes. But you know what, if you want to
17 find out the status of your account, nothing
18 prohibits you from contacting us. We can't
19 contact you, but you can contact us. So
20 they provide a customer service number. In
21 fact Miss Baker showed they provided several
22 numbers where that borrower can call in and
23 find out the status of the account. But we
24 can not talk to that borrower about past due
25 amounts. We are prohibited. And that's

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1 what that policy is designed to do. Does it
2 have the effect of taking away what is
3 perhaps a convenient method of payment for
4 this borrower? Of course. If the borrower
5 finds that to be the most convenient method
6 to drive by and get a receipt, yes. But
7 this is a balancing test. It's that way for

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8 a reason. It is that way so we can make
9 sure their payments are properly processed;
10 we can make sure that the tellers don't
11 provide or don't make an inappropriate
12 contact.

13 So is there a little disadvantage?
14 To the extent that's a disadvantage, yes.
15 It is a disadvantage to this borrower. But
16 it's justified based upon Chase's efforts to
17 comply with the Bankruptcy Code.

18 Now, I do have some points on
19 authorities, Your Honor. And if it's
20 helpful, while I refer to them, for your
21 clerk I did write them out.

22 THE COURT: Thank you.

23 MR. LESNIAK: Because I think as we
24 look at Section 105 there is some real
25 question that I need to place on record as

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1 to what is the Court's authority, what is
2 the extent to which the Court can act.
3 First thing, Your Honor, I wanted to point
4 out is a case in the Third Circuit. It is a
5 nonprecedental case. I've noted that. It
6 is the case of In re: Deleone, but it really
7 says what I would like to say very
8 succinctly.

9 Your Honor, can I skip the
10 citations in as much as I've provided them.

11 THE COURT: Yes, you can. When I

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12 find them, I'll let you know. And I found
13 that one.

14 MR. LESNIAK: Thank you. This one,
15 Your Honor, I'm looking at page -- excuse me
16 at page two of the opinion. It refers to
17 Chapter 13 proceedings, but the issue comes
18 up more in 13 because there are some basis
19 to modify mortgages in Chapter 13
20 proceedings. So I'm going to refer to two
21 Chapter 13 cases by analogy.

22 The Deleone case said: However,
23 section 1322(b)(2) precludes debtors from
24 modifying the rights of home lenders. If
25 the appellant intended to keep his home and

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1 continue making mortgage payments, he was
2 required to do so according to the original
3 terms of the mortgage. The Bankruptcy Code
4 does not direct Chase to provide branches
5 for which payments -- where at payments can
6 be made. The terms of the mortgage allow
7 Chase to decide where those payments should
8 be made. And Chase has done that in this
9 case. Now, I think it has done so in
10 compliance with the Code.

11 And there's a reason, Your Honor,
12 why it's like this. The Court in -- excuse
13 me, I'll take a moment. The Court in the
14 Nobleman case, Your Honor, the Supreme
15 Court --

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16 THE COURT: That's the one right
17 after that, okay.

18 MR. LESNIAK: Yes, it is. And I'm
19 quoting from page 329, which would be 508
20 U.S. 329. The Court referred to certain
21 rights of lenders, and the Supreme Court
22 says these are rights that were bargained
23 for by the mortgagor and the mortgagee and
24 they are rights protected from modification
25 by 1322(b)(2). Again, my point is that

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1 Chase bargained for these rights to
2 determine how payments should be made, and
3 it's appropriate that they exercise that
4 right. And they did exercise their right in
5 a way that let the borrowers know. They
6 sent a letter out promptly after the
7 bankruptcy proceeding was filed and they
8 learned about it. They sent a letter out
9 saying here's how we need to have you make
10 your payments, and we are monitoring your
11 account, yes, we are, because you have
12 special considerations being in bankruptcy.

13 Justice Stevens in his concurring
14 opinion explained that the legislative
15 history indicated that favorable treatment
16 of residential mortgages was intended to
17 encourage the flow of capital into the home
18 lending market. And what I'm saying here is
19 that I believe Chase had the right to

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20 determine where payments should be made. I
21 believe that right is not modified in
22 bankruptcy. And I believe Chase is entitled
23 to exercise that right when it sent those
24 borrowers a letter saying please make your
25 payments here and did not include local

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1 branches.
2 Moving into a little bit more
3 specifically on Section 105, Your Honor. I
4 would ask the Court to proceed with caution.
5 United States Court of Appeals in the Second
6 Circuit In re: Barbieri said the equitable
7 powers emanating from Section 105(a) are not
8 a license for a Court to disregard the clear
9 language and meaning of the bankruptcy
10 codes, bankruptcy statutes and rules. We
11 are mindful that the purpose of the
12 Bankruptcy Code is to afford the honest and
13 unfortunate debtor a fresh start, not to
14 shield those who abuse the bankruptcy
15 process in order to avoid paying their
16 debts. Nevertheless, our concerns about
17 abuse of the bankruptcy system do not
18 license us to redraft the statute. Courts
19 are not authorized to rewrite a statute
20 because they might deem its effects
21 susceptible of improvement.

22 In the Aquatic Development Group,
23 the United States Court of Appeals for the

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24 Second Circuit, in a concurring opinion of
25 Justice Straub stated: Nonetheless, this

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1 Court has repeatedly cautioned that Section
2 105(a) does not authorize the bankruptcy
3 courts to create substantive rights that are
4 otherwise unavailable under applicable law
5 or constitute a roving commission to do
6 equity. While perhaps expansive, the
7 equitable power conferred on the bankruptcy
8 courts by Section 105(a) is the power to
9 exercise equity in carrying out the
10 provisions of the Bankruptcy Code, not the
11 broader power to invoke equity to further
12 the purposes of the Code generally or
13 otherwise to do the right thing. Citing In
14 re: Barbieri.

15 The same sentiment has been
16 expressed in West Point Stevens Inc., which
17 is a case in United States District Court
18 for the Southern District of Illinois, I've
19 cited that case as well.

20 THE COURT: Illinois or New York?

21 MR. LESNIAK: Excuse me, New York,
22 Your Honor. Force of habit. Sorry about
23 that. In that case the District Court said:
24 Section 105 does not provide bankruptcy
25 courts with a roving writ, much less a free

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1 hand. The authority bestowed thereunder may
2 be invoked only if and to the extent that
3 the equitable remedy dispensed by the Court
4 is necessary to preserve an identifiable
5 right conferred elsewhere in the Bankruptcy
6 Code. Similar sentiment was stated by the
7 United States Bankruptcy Court.

8 THE COURT: So you're trying to
9 tell me that I cannot address conduct by
10 creditors that has a prejudicial effect on
11 debtors and interferes with their rights
12 under the Bankruptcy Code?

13 MR. LESNIAK: No, I'm not, Your
14 Honor. What I'm saying -- I'm not at all
15 saying that.

16 THE COURT: Okay.

17 MR. LESNIAK: But what I'm saying
18 is you can't create rights that don't exist.
19 There is no right in the Code for a borrower
20 to pay at a local branch bank. It's not
21 there. The right of the lender to determine
22 where the payments should have been made are
23 set out in the contract. That contract is
24 not changed by the Bankruptcy Code. It
25 still remains in full force and effect, and

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1 Chase is entitled to rely on that contract.
2 That's what I'm saying. I'm saying let's
3 slow down just a bit and recognize, please,

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4 that lenders have rights too. Those rights
5 are set out in their documentation, and
6 those rights are enforceable under the
7 Bankruptcy Code. The Bankruptcy Code
8 doesn't change those rights.

9 In here I believe Chase has
10 exercised those rights with regard for the
11 Bankruptcy Code requirements, with concern
12 about improper contacts with the debtor,
13 without discrimination, they apply special
14 treatment in a number of different
15 circumstances. And other borrowers who are
16 not located near Chase banks would not have
17 the ability to make those payments either.
18 So while their conduct in refusing that
19 particular payment, while it may be
20 troublesome in the individual instance in
21 the context of this case, where you have the
22 moving target, the borrowers are making a
23 payment at the same time you're moving for
24 relief from stay, I think that lawyers get
25 caught up in that advice all the time. And

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1 it's a juggling act. The way Chase has
2 chosen to deal with it is when they get
3 those checks, to send them on so their
4 counsel can deal with it with the borrower's
5 attorney, rather than being in a situation
6 where their counsel walks in to move for
7 relief from the stay, finds out the payment

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8 was made that he didn't know about, and then
9 the Court says, well, why are you here if
10 they have made the payment. The payments
11 were sent to Mr. Jose. He apparently tried
12 to deal with them. Decided to withdraw the
13 motion for relief from stay when he had
14 those payments in hand.

15 THE COURT: Which you still haven't
16 addressed on Pillar.

17 MR. LESNIAK: I --

18 THE COURT: And you can't?

19 MR. LESNIAK: I can't, Judge. I'm
20 sorry. If I tried to address that I would
21 undermine any credibility I've been able to
22 establish because I know nothing about it.

23 Does Your Honor have any questions.

24 THE COURT: Well, it is the
25 credibility to the Court that we are

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1 interested in.

2 No, I have no other questions.

3 MR. LESNIAK: Thank you, Judge.

4 THE COURT: Mr. Fallon, do you have
5 anything you wish to add?

6 MR. FALLON: Yes, just briefly,
7 Your Honor. I believe in listening to the
8 testimony as to what was or wasn't done
9 prior to bringing this motion, it was
10 woefully negligent. Apparently there is no
11 record of any appraisal having been done of

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12 the property. There is a record that they
13 do have that showed that there were two
14 payments made post-petition. They do not
15 mention it in their papers.

16 The other thing, Your Honor, and I
17 don't know how serious the Court wants to
18 consider the affidavit itself, that it says
19 it's signed in Columbus, Ohio, by a notary
20 in San Diego, not before a notary. I
21 suppose one could argue there really isn't
22 any affidavit there, so what was submitted
23 to the Court was an unsworn statement.

24 THE COURT: I admit that troubling.

25 MR. FALLON: And so therefore, that

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1 was not a proper thing to have done. And so
2 I think basically the Court is well within
3 its rights to say that with regard to just
4 bringing this petition, at the time -- or
5 not the petition -- the motion, June 29th at
6 best there was one month past due. All the
7 time that they showed through their own
8 evidence for approximately a year and a half
9 when my clients were past due pre-petition,
10 they just simply added it to the next
11 payment. There was no reason at this
12 particular point in time for them to go
13 forward and seek to lift the stay. There
14 were in no immediate danger of in any way
15 being jeopardized. Accordingly, I believe

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that sanctions should be imposed.

17 I would also add that while the
18 payments were received by Chase and I guess
19 Chase's attorney before August 22nd, it was
20 not until I believe November of 2007 that
21 Chase at that point, knowing that they had
22 the money and actually had not applied even
23 one month's payment then said we want to
24 withdraw this motion. In the meantime my
25 the client has had to come to my office on

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1 several occasions in preparing for this
2 matter. She's had to take time off from
3 work for a total of three days, which was
4 charged to her vacation time, and she's
5 going to have to incur additional attorneys'
6 fees. And I think they should all be
7 covered by Chase. There is no reason for
8 this to have been brought.

9 As far as punitive damages, I leave
10 that up to the Court to make a
11 determination. Thank you very much, Your
12 Honor.

13 THE COURT: You're welcome.

14 MR. LESNIAK: Your Honor, would you
15 like an explanation of that affidavit issue?

16 THE COURT: I've tried to get it
17 out of the witness. You can't explain it
18 here. You had a witness testify to it.

19 MR. LESNIAK: Okay.

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20 THE COURT: I don't think that
21 works.
22 MR. LESNIAK: Okay.
23 THE COURT: And it was not
24 satisfactory actually. So in fact, it
25 became more troubling. And this is sort of

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1 an aside and not to this case in particular,
2 but it is troubling that someone who is
3 charge in the affidavit isn't in charge of
4 the affidavit. And that that someone is not
5 doing it in front of the notary. And it's
6 done in batches. That, for every judge in
7 the country, is troubling. And in fact, I
8 will probably have to address it in this
9 case, but that's again...

10 Mr. Lesniak, I'm going to allow you
11 to submit a comprehensive or post-trial
12 submission, if you would prefer that. I'm
13 going to -- would you or would you be
14 comfortable with what you've just argued?

15 MR. LESNIAK: I would welcome, Your
16 Honor, the opportunity to submit one. I do
17 have a little bit of a timing issue. It
18 would probably take me about 21 to 28 days
19 to get it in. But you said comprehensive, I
20 would like to be able to prepare --

21 THE COURT: Well, you said earlier
22 that you didn't make a comprehensive
23 affidavit, and then you said the arguments

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24 and the testimony -- and so I would like to
25 give you the opportunity. Because I am

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1 looking at a Noseck value. So you need to
2 understand that's my thinking.
3 MR. LESNIAK: Yes.
4 THE COURT: I'm not joking about
5 this. This was not a -- when I started this
6 at the very beginning, and I told you that
7 this was one of those difficult things for a
8 Judge to do, this was a difficult thing for
9 a Judge to do. I do not do it lightly. So
10 when I'm talking about it, I'm talking about
11 serious --

12 MR. LESNIAK: Your Honor, I assure
13 you, I've taken nothing you've said today
14 lightly. And if that's where you're
15 thinking about going, I would definitely
16 like to make a submission once we have a
17 copy of the transcript so I can make
18 appropriate references to the testimony.

19 THE COURT: Okay, I'm going to
20 allow you to do so, because I am thinking in
21 that direction.

22 And I will give you part of my
23 thoughts on it. What I heard in testimony
24 and what I heard you say that Chase has a
25 policy in place that it claims is designed

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1 to accurately process payments from a
2 mortgagor in bankruptcy, but the process
3 places the administrative burden on the
4 debtors. And I see what you say was said in
5 the letters, but that wasn't the policy they
6 had in place for these people, and they did
7 accept these payments, and they can't tell
8 when they came in. So that's just
9 disingenuous to me.

10 And what I hear was Chase has a
11 conduct and policies that in effect create
12 an obstacle course for debtors who desire to
13 make their contractual mortgage payments,
14 albeit late.

15 Mr. Fallon and Mr. Lesniak, Mr.
16 Fallon has laid the groundwork for
17 attorneys' fees and actual damages for this
18 debtor in time off from work and travel. So
19 the groundwork has been laid. I would like
20 to hear -- I do not want to cut Chase short,
21 and I am concerned about how these
22 affidavits are done, and I think the
23 testimony has basically shown that they are
24 done in a rote basis. So I'm concerned
25 about that.

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1 I'm going to allow you -- and
2 you're right, 20 days is a good period of
3 time.

4 MR. LESNIAK: Your Honor, once I

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5 see the transcript, if it's possible, I
6 don't know how long it would take to procure
7 that transcript.

8 THE COURT: We'll put a rush on it.
9 You need to order it ASAP. You need to go
10 into the clerk's office before you leave and
11 order it, and we'll ask them to put a rush
12 on it.

13 MR. LESNIAK: Does Your Honor know
14 how long a rush takes, or would you like to
15 set a date now?

16 THE COURT: I can tell you this
17 goes to Manhattan, and they are used to
18 rushes. Sometimes they'll do them
19 overnight. I don't know what they'll do.
20 So yeah, let's set a date. Today is
21 February 1st. I am going to tentatively set
22 March 6th, but that will be subject to
23 change if it's not at least 20 -- I don't
24 like 20 -- 21 days, because I'm now trying
25 to get into the new civil procedure, 7, 14,

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1 21. 21 days from when you receive the
2 transcript, so keep us informed.

3 MR. LESNIAK: Your Honor, I'm
4 actually out of town the 5th and 6th of
5 March, so I expect I'll be filing that
6 early.

7 THE COURT: Okay, sounds good.

8 MR. LESNIAK: Unless the transcript

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9 is a problem, and I trust we can communicate
10 with your office.

11 THE COURT: You can communicate to
12 Mr. Fallon and then to chambers.

13 MR. FALLON: Your Honor, will I be
14 given the opportunity to respond at all?

15 THE COURT: Absolutely.

16 Did we get anything from the
17 highway patrol by any chance? Okay, we
18 haven't heard.

19 MR. LESNIAK: Thank you, Judge.

20 THE COURT: We did look on the
21 Internet, and there are myriad accidents
22 everywhere, and fatalities in East Fishkill.

23 MR. LESNIAK: I hear a siren going,
24 Your Honor.

25 THE COURT: I do too. Court is in

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1 recess.

2 MS. WEIGERT: Thank you, Your
3 Honor.

4 MR. LESNIAK: Thank you, Your
5 Honor.

6 MR. FALLON: Thank you, Your Honor.

7 THE COURT: Mr. Fallon, let's make
8 your response 14 days after you receive Mr.
9 Lesniak's.

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11 (Whereupon, the above-captioned
12 proceedings concluded.)

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